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No.

In the Supreme Court of the United States

DEVIN WELCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that a jury must find all facts other than a prior conviction beyond a reasonable doubt before a criminal defendant's sentence may be enhanced beyond the statutory maximum. In *Begay v. United States*, 553 U.S. 137, 145 (2008), this Court held that a "violent felony" under the Armed Career Criminal Act's residual clause requires that an offense involve "purposeful, violent, and aggressive" conduct. The questions presented, over which the panel below divided (Posner, J., dissenting) and the lower courts are in conflict, are as follows:

1. Is a criminal defendant's constitutional right to a jury trial violated when a prior nonjury juvenile adjudication is used to increase his term of imprisonment beyond the otherwise applicable statutory maximum?

2. Does vehicular flight from a police officer inherently involve purposeful, violent, and aggressive conduct such that it constitutes a "violent felony" under the Armed Career Criminal Act?

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PETITION FOR A WRIT OF CERTIORARI[1]

Petitioner Devin Welch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-52a) is reported at 604 F.3d 408. The district court's order denying the petition for a writ of habeas corpus (App., *infra*, 53a-61a) may be found at 2008 WL 2796953.

JURISDICTION

The court of appeals issued its opinion on May 4, 2010. On July 26, 2010, Justice Breyer extended the time to file a petition for a writ of certiorari to and including September 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * * ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[1] Counsel was appointed to represent the petitioner under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

18 U.S.C. § 924(e) provides in relevant part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony * * * committed on occasions different from one another, such person shall be * * * imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection –

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT

This case presents a mature split of authority over two recurring issues that affect a significant and growing number of criminal proceedings. The Armed Career Criminal Act ("ACCA") imposes a 15-year mandatory minimum sentence on felons who unlawfully possess a firearm and have three or more prior convictions for "a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). Without the ACCA enhancement, the statutory maximum sentence for a felon-in-possession offense is ten years. 18 U.S.C. § 924(a)(2). The two questions presented in this case concern the predicate offenses that may be used to increase a defendant's sentence under the ACCA and other similar sentence enhancement statutes.

The first issue is the proper scope of the "prior conviction" exception in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, this Court held that all facts other than a "prior conviction" must be found by a jury beyond a reasonable doubt before a criminal defendant's sentence may be enhanced beyond the statutory maximum. *Id.* at 490. In the decision below, a divided panel, over Judge Posner's dissent, held that the prior conviction exception applies to nonjury juvenile adjudications, and that such adjudications may therefore be used to enhance a subsequent sentence of an adult under the ACCA and other recidivist statutes.

The second issue is the meaning of "violent felony" as interpreted by this Court's recent decisions in *Begay v. United States*, 553 U.S. 137 (2008), and *Chambers v. United States*, 129 S. Ct. 687 (2009). In *Begay*, this Court held that a "violent felony" under the ACCA must not only present a risk of injury to

others, but also involve "purposeful, violent, and aggressive" conduct. 553 U.S. at 145. In *Chambers*, this Court rejected the contention that any form of "escape" is a "violent felony" because of the potential for violent confrontation upon recapture. Yet, the panel majority—again over Judge Posner's dissent—held that vehicular flight from a police officer qualifies as a "violent felony" within the meaning of the ACCA because it challenges an officer's authority and may result in confrontation, thereby satisfying *Begay*'s "purposeful, violent, and aggressive" standard.

The circuits too have diverged over both questions raised in this petition. Review is warranted to resolve these well-developed conflicts and to ensure compliance with this Court's Sixth Amendment and ACCA precedents.

A. Welch's Sentencing And Direct Appeal

Petitioner Devin Welch pled guilty to unlawful possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). Drug task force agents discovered the weapon hidden unloaded under a mattress in his mother's house while executing a search warrant. S.R. 20 ¶¶ 6-7.[2] The agents observed Welch walking with crutches, and he explained that he had been shot in the leg earlier that month. *Id.* ¶¶ 7, 48. As Welch later told the sentencing court, he obtained the gun to protect himself after his assailant continued to intimidate and threaten him. C.A. App. 17-18.

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[2] "S.R." refers to the supplemental record on appeal from Welch's underlying criminal proceedings.

The sentencing court classified Welch as an Armed Career Criminal ("ACC") under 18 U.S.C. § 924(e) based on a finding that he had three prior "violent felony" convictions: (1) a conviction for aggravated battery, (2) a conviction for aggravated fleeing or eluding a police officer, and (3) a juvenile adjudication for attempted armed robbery. Welch's counsel did not raise any objection to the basis for his sentencing, but Welch objected pro se to the use of his fleeing conviction and juvenile adjudication as predicate offenses. The district court overruled his objections.

Welch's offense level and criminal history category ordinarily would have resulted in a sentencing range of 77 to 96 months. The court's decision to classify three of his prior convictions as "violent felonies" automatically raised his minimum sentence to 180 months. During the sentencing hearing, counsel for the government acknowledged that Welch's prior criminal history was "[not] as severe as some others * * * who are armed career criminals," C.A. App. 41, and he accordingly recommended a sentence of 180 months—the bottom of the guidelines range and the mandatory minimum under the ACCA. The sentencing court agreed with the government's recommendation and sentenced Welch to 180 months' imprisonment, to be followed by a five-year term of supervised release.

On direct appeal, Welch, through the same counsel who had represented him at sentencing, did not pursue any of his pro se objections to the use of his prior convictions as ACCA predicates. Instead, he argued that the district court erred by improperly delegating authority to the probation office for drug testing during the period of supervised release. The

Seventh Circuit summarily affirmed the district court's judgment.

B. Petition For Habeas Relief In The District Court

Welch next sought collateral relief in the district court under 28 U.S.C. § 2255.[3] He reasserted his earlier pro se objection to the classification of his fleeing offense as a "violent felony," and he contended that his juvenile adjudication could not be used to enhance his sentence under *Apprendi* because he had not been afforded the right to a jury trial. Welch also claimed that his trial and appellate counsel rendered ineffective assistance by failing to raise any claims regarding Welch's ACC classification.

The district court denied Welch's § 2255 motion on each of these claims. The court held that although the Seventh Circuit had not yet resolved the issue of using a nonjury juvenile adjudication for sentence enhancement, it was reasonable for counsel to have declined to raise the issue where there was a three-to-one circuit split against Welch's position. On the vehicular fleeing claim, although this Court issued its decision in *Begay* while the § 2255 motion was pending, the district court evaluated Welch's argument based on pre-*Begay* case law classifying vehicular flight as a "violent felony" based solely on its potential for risk of injury.

The Seventh Circuit initially granted a certificate of appealability on the question whether Welch was denied effective assistance of counsel due to his failure to raise an *Apprendi* objection to the use of

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[3] Pursuant to Rule 14(g)(ii), petitioner notes that the district court had jurisdiction pursuant to 28 U.S.C. § 1331.

Welch's juvenile adjudication as an ACCA predicate. The court later expanded the certificate to include a challenge to Welch's fleeing conviction based on this Court's decision in *Begay*.

C. The Seventh Circuit's Decision

A divided Seventh Circuit panel affirmed the district court's judgment. With respect to Welch's ineffective assistance claim, the panel majority noted that it need not decide the merits of the underlying *Apprendi* issue under the *Strickland* standard. The court nonetheless decided to address the issue on the merits in the interest of judicial economy. App., *infra*, 33a. Welch's challenge to the use of his fleeing conviction in light of *Begay* was likewise considered entirely on the merits under § 2255(f)(3), which permits a collateral attack on a conviction based on a new and retroactively applicable rule of substantive criminal law.

The panel majority rejected Welch's *Apprendi* challenge to the use of his nonjury juvenile adjudication to enhance his sentence under the ACCA. The court acknowledged the circuit split over the issue, and it sided with the majority view that *Apprendi*'s "prior conviction" exception applies to juvenile adjudications despite the lack of a jury trial right. In the panel's view, "[p]rior convictions are not subject to the *Apprendi* rule if the defendant received all the protections to which he was constitutionally entitled, and the integrity of the fact-finding procedures are thereby ensured." App., *infra*, 40a. Relying on *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), which held that juvenile proceedings do not require a jury trial under the Sixth Amendment, the panel majority concluded that other protections accorded juvenile defendants ensure that their adjudications are

sufficiently reliable to bring them within the scope of *Apprendi*'s "prior conviction" exception.

The panel majority further held that Welch's vehicular fleeing offense was properly deemed a "violent felony" under the ACCA. Here, too, the court acknowledged that the circuits are divided over the issue, App., *infra*, 32a n.21, and it sided with the courts holding that vehicular fleeing involves "purposeful, violent, and aggressive" conduct as required by *Begay* and therefore qualifies as a predicate offense. According to the panel majority, intentionally defying an officer's command is inherently aggressive and violent because it "involves affirmative action," "challenges the immediate authority of the police officer and calls on the officer to give immediate chase[,]" thereby "endanger[ing] others." *Id.* at 30a-31a.

Judge Posner dissented on both issues. App., *infra*, 41a-52a. With respect to Welch's *Apprendi* claim, Judge Posner noted as an initial matter that Welch's juvenile adjudication "was not a 'conviction' at all, because in Illinois as in other states a juvenile-court proceeding * * * is not deemed a criminal proceeding." *Id.* at 43a. He viewed this Court's holding in *McKeiver* that juveniles are not entitled to a jury trial as irrelevant to the constitutional concerns at issue in *Apprendi*. Pointing out that "[t]he constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement," he reasoned that "the mere fact that a juvenile had all the process he was entitled to doesn't make his juvenile conviction equivalent, for purposes of recidivist enhancements, to adult convictions." *Id.* at 46a. Judge Posner further pointed to a number of

empirical studies showing that juvenile adjudications often lack the reliability of adult convictions, and that judges are more likely than juries to convict juveniles. "[I]f it is true that juvenile defendants fare worse before judges than they would before juries [then] one cannot fob off the *Apprendi* argument with the observation that a jury makes no difference." *Id.* at 47a-48a.

On the vehicular fleeing issue, Judge Posner disagreed with the majority's understanding of *Begay*'s "purposeful" requirement. He explained that the term should be interpreted to mean "trying to harm a person's person or property" rather than merely acting with specific intent. App., *infra*, 50a. Because vehicular flight does not involve any intent to cause harm to others, he found the offense different in kind from the sample crimes listed in the statute's definition of a "violent felony." Judge Posner also rejected the majority's conclusion that fleeing is inherently "violent and aggressive." He observed that the majority's focus on the fleeing offender's "defiance of authority" conflicted with this Court's conclusion in *Chambers* that "we can't treat all escapes alike." *Id.* at 51a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve The Split Among The Circuits And State Courts Of Last Resort Over The Scope Of *Apprendi*'s "Prior Conviction" Exception.

The federal appellate courts and state supreme courts are openly and intractably split over the scope of a criminal defendant's jury trial rights. The court below sided with courts holding that juvenile adjudications are equivalent to adult convictions for *Ap-*

prendi purposes, despite their lack of a jury trial right, and therefore may be used to increase a defendant's sentence beyond the statutory maximum. That ruling conflicts both with the holdings of other courts and with this Court's Sixth Amendment precedents. This Court should grant review to clarify the meaning of *Apprendi*'s "prior conviction" exception, a recurring issue with enormous implications for the sentencing of many criminal defendants.

A. The Lower Courts Are Divided Over Whether Prior Nonjury Juvenile Adjudications Fall Within The "Prior Conviction" Exception.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court emphasized that prior convictions are a "narrow exception" based on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which permitted sentence enhancement based on a judicial finding of a prior conviction.[4] The Court noted that *Almendarez-Torres* was "at best an exceptional departure from the historic practice" of requiring juries to find facts that would expose defendants to more severe penalties. *Apprendi*, 530 U.S. at 487. The *Apprendi* Court explained that a prior conviction is unlike other sentence-enhancing

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[4] This Court need not reconsider its holding in *Almendarez-Torres* to resolve the question presented. However, if the Court decides to do so, the validity of *Almendarez-Torres* could be deemed "fairly included" within the question presented. See Supreme Court Rule 14.1(a).

facts because "there is a vast difference between accepting the validity of a prior judgment of conviction entered *in a proceeding in which the defendant had the right to a jury trial* and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Id.* at 496 (emphasis added).

Following *Apprendi*, courts have diverged over whether prior juvenile adjudications in which the defendant had no right to a jury trial fall within *Apprendi*'s "prior conviction" exception. In the decision below, the panel majority reasoned that proceedings in which the defendant received all procedural protections to which he was constitutionally entitled—even if those protections do not include a jury trial—are sufficiently reliable to meet *Apprendi*'s "prior conviction" exception. App., *infra*, 40a. The panel majority opined that juvenile defendants are afforded several other protections that "ensure" the "integrity of the fact-finding procedures," such as the rights to notice, counsel, and confrontation of witnesses, as well as the proof beyond a reasonable doubt standard. *Ibid.* But the panel majority concluded that because juveniles are not constitutionally entitled to a jury trial under *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), nonjury juvenile adjudications "are not subject to the *Apprendi* rule." *Ibid.* That ruling deepens a conflict over the issue among the federal and state courts.

The Seventh Circuit joined five federal appellate courts and five state supreme courts that have ruled that judges may increase a defendant's sentence beyond the statutory maximum based on a prior juvenile adjudication that did not include a jury trial

right. These courts also based their holdings on the presumed reliability of nonjury juvenile adjudications in light of other guaranteed procedural protections. See *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) (procedural safeguards aside from the use of a jury "are more than sufficient to ensure the reliability that *Apprendi* requires"); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) ("A prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes."); *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005) (a prior nonjury juvenile adjudication may be considered a prior conviction for *Apprendi* purposes where the defendant received "the totality of constitutional protections due"); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007) ("Juvenile adjudications * * * provide sufficient procedural safeguards to satisfy the reliability requirement that is at the heart of *Apprendi*."); *United States v. Wright*, 594 F.3d 259, 264 (4th Cir. 2010) (a prior nonjury juvenile adjudication may be used for sentencing consideration where it is otherwise "constitutionally sufficient to commit a juvenile to confinement"). Accord *People v. Nguyen*, 209 P.3d 946 (Cal. 2009); *State v. Weber*, 149 P.3d 646 (Wash. 2006); *State v. McFee*, 721 N.W.2d 607 (Minn. 2006); *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005); *State v. Hitt*, 42 P.3d 732 (Kan. 2002).

In contrast, the Ninth Circuit has flatly rejected the view that nonjury juvenile adjudications fall within *Apprendi*'s "prior conviction" exception. In *United States v. Tighe*, 266 F.3d 1187, 1192, 1194 (9th Cir. 2001), the court focused on the "significant constitutional differences between adult convictions and juvenile adjudications," and on the *Apprendi*

Court's explicit description of the fact of a prior conviction as a "narrow exception" to the general rule guaranteeing a jury trial right when sentence enhancements are at stake. The court viewed *Apprendi*'s prior conviction exception as "premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections—particularly the right to a jury trial and proof beyond a reasonable doubt." *Id.* at 1194. As such, the Ninth Circuit held that "the 'prior conviction' exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt." *Ibid.*

The Louisiana Supreme Court likewise holds that under *Apprendi*, nonjury juvenile adjudications cannot be used to increase a defendant's sentence beyond the statutory maximum. In *State v. Brown*, 879 So. 2d 1276, 1288 (La. 2004), the court noted that juveniles receive fewer procedural safeguards than adults because "[u]nder the guise of *parens patriae*, juvenile courts emphasize treatment, supervision, and control rather than punishment" and the proceedings are "non-criminal or 'civil'" in nature. The court observed: "It seems contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use adjudications obtained for treatment purposes to punish them more severely as adults." *Id.* at 1289. "If a juvenile adjudication, with its lack of a right to a jury trial which is afforded to adult criminals, can then be counted as a predicate offense the same as a felony conviction for purposes of [sentence enhancement], then 'the entire claim of *parens patriae* becomes a hypocritical mockery.'" *Ibid.* The

court agreed with *Tighe*'s reasoning that the prior conviction exception applies only to "proceedings that afforded crucial procedural protections—particularly fair notice, the right to jury trial and proof beyond a reasonable doubt." *Id.* at 1290. Accordingly, the court held that nonjury juvenile adjudications "cannot be excepted from *Apprendi*'s general rule." *Ibid.*

The Oregon Supreme Court has adopted yet another interpretation of *Apprendi*. In *State v. Harris*, 118 P.3d 236 (Or. 2005), the court rejected the view that *Apprendi*'s "prior conviction" exception turns on whether the prior proceeding afforded the defendant sufficient procedural safeguards to ensure its reliability. The court noted that under this Court's precedents, "the jury's importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable fact finder." *Id.* at 243. "From the framers' perspective, the jury was also meant to serve as the people's check on judicial power at the trial court level." *Ibid.* The Oregon Supreme Court did not join *Tighe* and *Brown* in holding that the state must prove to a jury that the defendant actually committed the crime alleged in the juvenile adjudication to use it as a basis for sentence enhancement. However, the court rejected the view that such adjudications fall within *Apprendi*'s "prior conviction" exception and therefore need not even be presented to the jury in the adult criminal trial. Instead, the court held, "the Sixth Amendment requires that when such an adjudication is offered as an enhancement factor to increase a criminal sentence, its *existence* must either be proved to a trier of fact or be admitted by a defendant." *Id.* at 246 (emphasis added).

In short, there is a deep and persistent conflict among the circuits and state courts over use of prior nonjury juvenile adjudications for sentence enhancement purposes. The conflict is well entrenched, having existed for nearly a decade, and further percolation is unnecessary because the analytical issues have been fully explored. Only this Court can clarify the proper scope of *Apprendi*'s "prior conviction" exception.

B. The Ruling Below Conflicts With This Court's Sixth Amendment Precedents.

Review also is warranted because the Seventh Circuit's ruling conflicts with this Court's recent Sixth Amendment precedents and misapprehends the nature of juvenile proceedings. In holding that nonjury juvenile adjudications constitute "prior convictions" for purposes of the *Apprendi* rule, the Seventh Circuit eviscerated the distinction between juvenile proceedings and criminal trials. See *McKeiver*, 403 U.S. at 550 (juvenile proceedings should not be "equated" with criminal trials); *Schall v. Martin*, 467 U.S. 253, 263 (1984) ("The State has a *parens patriae* interest in preserving and promoting the welfare of the child, which makes a juvenile proceeding fundamentally different from an adult criminal trial") (citation omitted). Indeed, under Illinois law, a juvenile adjudication is not considered a "conviction" at all because it does not involve criminal proceedings. *In re W.W.*, 454 N.E.2d 207, 210 (Ill. 1983) ("[J]uvenile proceedings are not criminal in nature. As such, a minor is neither 'convicted' nor considered a 'defendant' or an 'accused.' Nor is a proceeding under the Juvenile Court Act denominated a 'conviction'").

The Seventh Circuit declined to consider the aspects of juvenile proceedings that differentiate them from criminal trials, such as their character and objectives, instead focusing exclusively on whether nonjury juvenile adjudications provide constitutionally adequate procedural safeguards. In the panel majority's view, *Apprendi*'s exception for "prior convictions" had nothing to do with the jury trial right, but was instead based on this Court's belief that "procedural safeguards surrounding such a conviction gave it sufficient reliability that further protections were not required." App., *infra*, 34a. On that basis, the court held that because nonjury adjudications were deemed sufficiently "reliable" to meet due process requirements for juveniles in *McKeiver*, they are not subject to the *Apprendi* rule. *Id.* at 40a.

The court's analysis ignores important considerations that compel the opposite result. First, it disregards the actual language of this Court's decisions. In explaining the reason for the "prior conviction" exception, the *Apprendi* Court emphasized that "there is a vast difference between accepting the validity of a prior judgment of conviction entered *in a proceeding in which the defendant had the right to a jury trial* and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." 530 U.S. at 496 (emphasis added). The Court previously had explained that the right to a jury trial made a prior conviction constitutionally distinct from other sentence-enhancing factors. "One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense * * * a prior conviction must itself have been established through procedures satisfying

the fair notice, reasonable doubt and *jury trial guarantees*." *Jones v. United States*, 526 U.S. 227, 249 (1999) (emphasis added). As Judge Posner summarized in dissent, "the Supreme Court require[s] that any fact, as distinct from a conviction, used to enhance a sentence be a fact found by a jury." App., *infra*, 44a. The Seventh Circuit majority reduced this principle to a requirement "that a defendant must receive all the protections to which he is entitled." *Id.* at 40a. But as Judge Posner explained, if that is what the *Apprendi* Court meant, "[w]hy didn't the Court just say that the fact must be found by a reliable means?" *Id.* at 45a. *Apprendi* held that due process requires that *a jury* find beyond a reasonable doubt all facts necessary to enhance a defendant's sentence. That holding is irreconcilable with the notion that the "prior conviction" exception is totally divorced from the jury trial right.

The Seventh Circuit's analysis also ignores the reasoning on which *McKeiver* was based. *McKeiver* was premised on the idea that juveniles do not require the same procedural safeguards as criminal trials because juvenile courts are designed to provide "an intimate, informal protective proceeding" rather than a determination of criminal guilt. 403 U.S. at 545, 553. While conceding that the "fond and idealistic hopes" of the juvenile court system had not yet been realized, the Court was "particularly reluctant to say * * * that the system cannot accomplish its rehabilitative goals." *Id.* at 543, 547. The Court was especially concerned that "the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end" to the system's "idealistic prospect." *Id.* at 545.

The Court further assumed that a jury trial right "would not strengthen greatly, if at all, the fact-finding function." 403 U.S. at 547. Although some courts have seized on this language to rationalize the use of prior juvenile adjudications for sentence enhancements, they fail to come to grips with *McKeiver*'s reasoning. In *McKeiver*, lack of a jury trial right did not offend due process where an ostensibly protective system sought to rehabilitate juvenile delinquents and thus "the consequences of adjudication are *less severe* than those flowing from verdicts of criminal guilt." *Id.* at 553 (White, J., concurring) (emphasis added). The decision below turns *McKeiver* on its head in holding that such juvenile adjudications are sufficiently reliable to be used in the entirely different context of imposing *enhanced* penalties on adults. As Judge Posner observed:

> The constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement. So the mere fact that a juvenile had all the process he was entitled to doesn't make his juvenile conviction equivalent, for purposes of recidivist enhancements, to adult convictions.

App., *infra*, 46a.

Finally, in its exclusive focus on whether juvenile adjudications are reliable, the Seventh Circuit failed to appreciate that *Apprendi*'s emphasis on the procedural right to trial by jury encompasses constitutional concerns beyond mere due process reliability in fact-finding. *Apprendi*, and indeed this Court's entire body of Sixth Amendment precedents, also preserves the jury's role in protecting defendants

from government oppression through its traditional power of nullification. See *Apprendi*, 530 U.S. at 479 n.5 (juries have historically "devised extralegal ways of avoiding * * * the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct"); *Ring v. Arizona*, 536 U.S. 584, 607 (2002) ("The Sixth Amendment jury trial right * * * does not turn on the relative rationality, fairness, or efficiency of potential factfinders").

This question implicates the centrality of the jury system to our system of justice. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives *wholly from the jury's verdict*." *Blakely v. Washington*, 542 U.S. 296, 305-306 (2004) (emphasis added) (citations omitted). The ruling below confirms "the Framers' fears that the jury right could be lost not only by gross denial, but by erosion." *Apprendi*, 530 U.S. at 483.

C. The Constitutional Question Presented Is Of Great Importance To The Administration Of Criminal Justice.

The question whether nonjury juvenile adjudications are subject to *Apprendi* is a recurring issue involving "constitutional protections of surpassing importance." *Apprendi*, 530 U.S. at 476. The Seventh Circuit's extension of *McKeiver* to the adult sentence-enhancement context is particularly troubling in light of empirical studies that undermine its assumption that nonjury juvenile adjudications are as reliable as adult convictions. Research comparing judge and jury decision-making demonstrates mate-

rial differences in the fact-finding process. Although judges and juries often agree, "when they differ, juries are far more likely to acquit defendants than are judges given the same types of evidence." Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1162 (2003).

The data confirm that juries best protect the Sixth Amendment's guarantees. The fact that judges hear so many similar cases compromises accurate judicial fact-finding. As compared with juries, individual judges often engage in a more casual evaluation of the facts and application of the standard of proof; rely unduly on familiar police and probation officers who testify on a recurring basis; fail to compartmentalize inadmissible and prejudicial evidence; show less sympathy toward youthful defendants; and are influenced by biases that are otherwise counterbalanced through group deliberation. See *id.* at 1163-1169; Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 302-306 (2007). These differences matter. As Judge Posner reasoned:

> [I]f it is true that juvenile defendants fare worse before judges than they would before juries—if there is reason to think that trial by jury would alter the outcomes in a nontrivial proportion of juvenile cases—one cannot fob off the *Apprendi* argument with the observation that a jury makes no difference.

App., *infra*, 47a-48a.

At present, juveniles have no right to a trial by jury in 37 states. Stephen F. Donahoe, *The Problem With Forgiving (But Not Entirely Forgetting) the Crimes of Our Nation's Youth: Exploring the Third Circuit's Unconstitutional Use of Nonjury Juvenile Adjudications in Armed Career Criminal Sentencing*, 66 U. PITT. L. REV. 887, 904 n.109 (2005). Under the ruling below, adjudications in those states may be used to enhance later sentences, which typically lengthens them considerably. A record of a prior juvenile adjudication allows for sentence enhancements by over forty years in eleven states, by twenty to forty years in six states, and by up to twenty years in another seven states. Joseph B. Sanborn, Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 21 (2000). This case dramatically illustrates the impact. The court's use of petitioner's nonjury juvenile adjudication as an ACCA predicate resulted in a sentence that is double what it otherwise would have been.

The conflict among the lower courts results in enormous differences in the severity of sentences for criminal defendants. These unfair disparities require this Court's clarification of the scope of *Apprendi*'s "prior conviction" exception.

II. This Court Should Resolve Whether Vehicular Fleeing Is A "Violent Felony" Under The Armed Career Criminal Act.

The Court also should resolve the conflict over whether vehicular flight from a police officer is a "violent felony" under the ACCA in light of *Begay v. United States*, 553 U.S. 137 (2008). The panel majority held that vehicular fleeing is "purposeful, violent, and aggressive," and that a conviction for this offense therefore warrants a substantial sentence enhance-

ment designed for armed career criminals. The court interpreted the *Begay* requirements expansively, contrary to this Court's limitation of the ACCA to genuinely violent crimes. Moreover, the Seventh Circuit's reliance on a hypothetical risk of confrontation conflicts with *Chambers v. United States*, 129 S. Ct. 687 (2009), and decisions of other circuits. This Court should grant review to clarify the meaning of "violent felony" and ensure compliance with this Court's precedents governing sentencing under recidivist statutes.

A. Federal Appellate Courts Are Divided Over Whether Vehicular Fleeing Is A "Violent Felony" Under The ACCA.

The ACCA imposes severe sentence enhancements for unlawful possession of a firearm where the defendant has three prior convictions for "a violent felony," including any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e).

In *Begay*, this Court limited the meaning of "violent felony" to crimes that "are roughly similar, in kind as well as in degree of risk posed" to the sample offenses enumerated in the statute—burglary, arson, extortion, and crimes involving the use of explosives. 553 U.S. at 143. At issue in *Begay* was whether driving under the influence qualifies as a violent felony because it "presents a serious potential risk of physical injury to another." The Court held that risky conduct alone is not enough to make a crime a "violent felony," and that the offense must also involve "purposeful, violent, and aggressive conduct" to warrant sentence enhancement. *Id.* at 145. The Court looked to the Act's basic purpose—imposing heightened punishment on armed career criminals—to hold

that driving under the influence is not a "violent felony" within the meaning of the statute because it is "a crime of negligence or recklessness, rather than violence or aggression." *Id.* at 146. Moreover, it lacks the "deliberate kind of behavior" associated with a likelihood of future misuse of firearms. *Id.* at 147.

Since *Begay*, the lower courts have repeatedly confronted the question whether the ACCA and similar sentence enhancement statutes apply to fleeing or eluding a police officer. Four federal courts of appeals, including the Seventh Circuit below, have held that any vehicular fleeing offense is a violent felony. In contrast, the Eighth and Eleventh Circuits have held that vehicular fleeing does not constitute a violent felony when the offense does not involve high-risk factors.

The Seventh Circuit analogized fleeing to escapes from custody, stating that "vehicular fleeing necessarily involves affirmative action on the part of the perpetrator." App., *infra*, 30a. The panel majority described fleeing as "violent and aggressive" because "one who flees a police officer in a vehicle draws attention to himself, challenges the immediate authority of the police officer and calls on the officer to give immediate chase." *Id.* at 31a. The panel majority supported its holding by hypothesizing a likelihood of future misuse of a firearm: "An individual's purposeful decision to flee an officer in a vehicle when told to stop, reflects that if that same individual were in possession of a firearm and asked to stop by police, [he] would have a greater propensity to use that firearm in an effort to evade arrest." *Id.* at 31a-32a.

Three other circuits similarly have focused on the alleged defiance of the fleeing offender and the

potential for violent confrontation with the officer. See *United States v. Wise*, 597 F.3d 1141, 1147 (10th Cir. 2010) (fleeing "poses the threat of a direct confrontation between the police officer and the occupants of the vehicle" and "will always involve an overt, rather than covert, disobedience of an officer's command");[5] *United States v. Young*, 580 F.3d 373, 377-378 (6th Cir. 2009) (fleeing involves "a clear challenge to the officer's authority" and "typically lead[s] to a confrontation between the offender and the officer"); *United States v. Harrimon*, 568 F.3d 531, 535 (5th Cir. 2009) ("Fleeing by vehicle * * * typically initiates pursuit [and] 'will typically lead to a confrontation with the officer being disobeyed,' a confrontation fraught with risk of violence").

But two other circuits have rejected that focus on the defiance of the offender and risk of confrontation. In *United States v. Tyler*, 580 F.3d 722, 725 (8th Cir. 2009), the Eighth Circuit held that vehicular flight under Minnesota law is *not* a crime of violence because the statute at issue criminalized behavior that is "neither violent nor aggressive," such as "merely extinguish[ing] motor vehicle headlights or taillights." The court rejected the state's view that fleeing is violent and aggressive, noting "the elements of the statute do not require a confrontation, chase, or any other conduct indicating that the crime in question necessarily involves conduct presenting a seri-

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[5] *Wise* and several other decisions cited below consider whether vehicular fleeing is a "crime of violence" under Section 4B1.2 of the federal sentencing guidelines rather than a "violent felony" under the ACCA, but federal courts treat the definitions as identical. *E.g.*, *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008); *United States v. Serafin*, 562 F.3d 1105, 1113 n.9 (10th Cir. 2009).

ous risk of physical injury to another or conduct that is violent and aggressive." *Ibid.* In *United States v. Harrison*, 558 F.3d 1280, 1295 (11th Cir. 2009), the Eleventh Circuit likewise rejected the argument that disobedience of an officer's command was enough to treat vehicular fleeing—at least in its unaggravated form—as a violent felony. "[D]isobeying a police officer's signal and continuing to drive on, without high speed or reckless conduct, is not sufficiently aggressive and violent to be like the enumerated ACCA crimes." *Ibid.* The court found the comparison of fleeing to escape inapt, observing that "*Chambers* rejects the notion that all escapes are created equal." *Ibid.*

As the growing number of decisions in the lower courts indicates, a prior conviction for vehicular fleeing is frequently used as a predicate offense to increase defendants' sentences under the ACCA and other similar sentence enhancement statutes.[6] Resolving the question whether fleeing an officer is a "violent felony" under the ACCA would therefore affect many criminal cases. The circuit split has resulted in intolerable disuniformity. A defendant's sentence may be enhanced by over five years for extinguishing her headlights upon being signaled to stop in one circuit but not another. As Judge Posner

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[6] For example, since *Begay* was decided, the Seventh Circuit alone has confronted this issue at least seven times and held that vehicular fleeing is a "violent felony" or a "crime of violence" in each case. See *United States v. Womack*, 610 F.3d 427 (7th Cir. 2010); *United States v. Dunson*, 603 F.3d 1023 (7th Cir. 2010); *United States v. Sykes*, 598 F.3d 334 (7th Cir. 2010); *United States v. Dismuke*, 593 F.3d 582 (7th Cir. 2010); *United States v. Jennings*, 544 F.3d 815 (7th Cir. 2008); *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008).

urged, this Court should resolve this issue. App., *infra*, 52a.

B. The Seventh Circuit's Holding That Vehicular Fleeing Qualifies As A "Violent Felony" Contravenes This Court's ACCA Precedents.

As Judge Posner's dissent explains, the panel majority's reasoning is in error. While vehicular flight may present a risk of injury to others in some circumstances, it is not inherently "purposeful, violent, and aggressive" like the enumerated offenses of the residual clause. Moreover, the panel majority's emphasis on the mere possibility of confrontation upon termination of the pursuit is inconsistent with *Chambers v. United States*, 129 S. Ct. 687 (2009), where this Court reversed a Seventh Circuit ruling that *any* form of escape is categorically a crime of violence.

To begin with, fleeing is not "purposeful" as *Begay* used the term to classify a "violent felony." The enumerated crimes have a commonality in their "purposefulness" that exceeds mere intentional engagement in unlawful conduct. Each crime has *as its purpose* the infliction of harm, either to persons or property, which in turn makes it more likely that the offender would be willing to "use [a] gun deliberately to harm a victim." *Begay*, 553 U.S. at 145 ("burglary is an unlawful or unprivileged entry into a building or other structure with intent to commit a crime[;] arson is causing a fire or explosion with the purpose of, e.g., destroying a building * * * of another or damaging any property * * * to collect insurance[;] extortion is purposely obtaining property of another through threat of, e.g., inflicting bodily injury[;] the word 'use' [with respect to explosives] most naturally

suggests a higher degree of intent than negligent or merely accidental conduct") (internal quotation marks and citations omitted). As Judge Posner explained, "[g]iven that the purpose of the catch-all provision in the Armed Career Criminal Act is to enable courts to identify crimes that are similar to the enumerated ones, 'purposeful' should be interpreted to mean trying to harm a person's person or property, which is characteristic of the enumerated crimes." App., *infra*, 50a.

A fleeing suspect does not act with the purpose of causing harm to others. Rather, fleeing is a defensive action in which the offender's only objective is to avoid being detained by the police. In that sense, it is like escape, where the offender's "mental state is only intent to be free of custody, not intent to injure or threaten anyone." *United States v. Templeton*, 543 F.3d 378, 383 (7th Cir. 2008). In this respect, fleeing can be compared to "failure to report" offenses and "walkaway escapes," which courts have held are *not* violent felonies. See *ibid.*; *Chambers*, 129 S. Ct. at 687; *United States v. Lee*, 586 F.3d 859, 868-874 (11th Cir. 2009); *United States v. Hopkins*, 577 F.3d 507, 512-515 (3d Cir. 2009); *United States v. Charles*, 576 F.3d 1060, 1066-1069 (10th Cir. 2009). Although fleeing entails a greater degree of risk to others, the *Begay* Court rejected the argument that the dangerousness of a person's conduct—where otherwise "far removed * * * from the deliberate kind of behavior associated with violent criminal use of firearms"—suffices "to create an element of intent," even when engaged in knowingly. 553 U.S. at 145, 147.

The Seventh Circuit also erred in characterizing vehicular fleeing as "violent and aggressive." The panel majority reasoned:

> [O]ne who flees a police officer in a vehicle draws attention to himself, challenges the immediate authority of the police officer and calls on the officer to give immediate chase. Whether the officer accepts that invitation, the perpetrator takes action to elude capture with his vehicle, action that, by its very nature, endangers others.

App., *infra*, 31a. The court effectively shoehorned the fleeing offense into the definition of a "violent felony" by suggesting the offender displays an attitude of hostile defiance and actually *seeks* a pursuit. But panic-induced disobedience is quite different from aggression. Ordinarily, the fleer hopes that the officer will *not* give chase and *not* put himself at risk—his operative motive is simply to get away. That the officer is likely to pursue him regardless of the fleer's subjective intentions does not transform the flight into a violent and aggressive act. Moreover, as Judge Posner observed, defiance of authority is characteristic of many types of conduct that are hardly violent and aggressive, such as failure to report to prison and walkaway escapes (and indeed civil disobedience). App., *infra*, 51a-52a. The panel majority's elastic use of "violent" and "aggressive" cannot blur the plain distinction between the genuinely violent conduct targeted by the ACCA and the merely reckless behavior excluded by *Begay*.

The Seventh Circuit also pointed to the possibility of a violent confrontation upon termination of the pursuit if the fleer possesses a firearm. App., *infra*, 31a-32a. But this Court in *Chambers* rejected the state's use of similar conjecture to correlate the mindset of a failure-to-report offender with the conduct targeted by the statute. 129 S. Ct. at 693 (of-

fenders are not significantly more likely to attack or physically resist police apprehenders given government data "show[ing] only a small risk of physical violence"). Here, too, the court below assumed that "every escape scenario is a powder keg," a rationale that *Chambers* flatly rejected.

Moreover, the likelihood that fleeing offenders will engage in violent conduct appears to be relatively low. In a survey of offenders who fled from police, 32 percent said they fled because they were driving a stolen car, 28 percent said they fled because they were driving with a suspended license, 22 percent said they fled because they were driving under the influence, and 17 percent said they fled because they possessed drugs. Geoffrey P. Alpert, et al., POLICE PURSUITS: WHAT WE KNOW 122 (2000). Police agency data show that the majority of pursuits are initiated because of minor traffic offenses and suspected DUI. James H. Auten, AN ANALYSIS OF POLICE PURSUIT DRIVING OPERATIONS: AN OVERVIEW OF THE RESULTS 36-37 (U. of Ill. Police Training Institute 1994); Geoffrey P. Alpert, et al., *The Constitutional Implications of High-Speed Police Pursuits Under a Substantive Due Process Analysis: Homeward Through the Haze*, 27 U. MEM. L. REV. 599, 607-621 (1997). These statistics undermine any assumption that the typical offender is likely to be a dangerous felon. As a leading expert on police pursuits observed:

> [M]ost suspects flee the police to avoid apprehension because they are frightened and do not want to face the consequences of the charges the police could bring against them. * * * [O]ur data show that many suspects flee because they are afraid, or are just

> making an irresponsible decision, not because they have committed a serious crime.

Alpert, POLICE PURSUITS, *supra*, at 159-160. Petitioner's own reason for fleeing is consistent with this typical scenario: after being signaled to pull over because police observed him speeding, Welch fled because he did not have a valid driver's license. S.R. 20 ¶ 29.

As the Eleventh Circuit concluded, a typical fleeing offender "is not, in our mind, cut from the same cloth as burglars, arsonists, extortionists, or those that criminally detonate explosives. The fleeing crime in [Florida's statute] seems more appropriately characterized as the crime of a fleeing coward—not an armed career criminal bent on inflicting physical injury." *Harrison*, 558 F.3d at 1296. Much like driving under the influence, vehicular fleeing may present a potential risk of physical injury to another, but fright in flight is not comparable to the type of violent crimes committed by armed career criminals for which Congress intended heightened punishment.[7]

Review of the decision below will provide this Court with an opportunity to clarify the scope of the *Begay* standard. Lower courts have struggled over the meaning and application of the "purposeful, violent, and aggressive" framework. *E.g.*, *United States*

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[7] To the extent there is any doubt regarding the ACCA's application to vehicular fleeing, the rule of lenity should apply. See *Ladner v. United States*, 358 U.S. 169, 178 (1958) ("the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended").

v. Herrick, 545 F.3d 53, 58 (1st Cir. 2008) (*Begay*'s "violent and aggressive" standard "used language subject to varying interpretations" and "the Supreme Court did not define those terms or explain in other than conclusory terms why a DUI was not violent or aggressive"); *United States v. Woods*, 576 F.3d 400, 413 (7th Cir. 2009) (Easterbrook, J., dissenting) (it may be "easy to tell when a person's *conduct* was violent and aggressive, but whether a crime of conviction entails such conduct can be tricky, because it is necessary to think through the many varieties of behavior within a law's domain. States did not write their statutes with *Begay* in mind"). This case offers an ideal opportunity to clarify the meaning of "violent felony" as defined in *Begay*.

Accordingly, this Court should accept Judge Posner's invitation to explain how to apply *Begay*'s "purposeful" requirement in this context. "Adopting a rule that would exclude from the category of 'violent felony' a crime that while it may be dangerous does not involve any intention of harming anyone would go some distance toward clarifying the meaning of 'violent felony.'" App., *infra*, 52a. Such a rule not only would lead to more consistent and equitable outcomes in criminal proceedings, but also would reduce "the avalanche of litigation" over the ACCA's application in light of *Begay*. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 08-3108.

Devin WELCH, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 2:08-cv-02051-MPM-DGB
Michael P. McCuskey, Chief Judge

Argued Dec. 4, 2009.
Decided May 4, 2010.

Before POSNER, RIPPLE and WOOD, Circuit Judges.

RIPPLE, Circuit Judge.

In 2005, Devin Welch pleaded guilty to unlawful possession of a firearm by a felon. He then brought a motion under 28 U.S.C. § 2255 to vacate his sentence. The district court denied the § 2255 motion in pertinent part. We granted a certificate of appealability to address two of Mr. Welch's contentions. First, he submits that his prior conviction for the Illinois crime of aggravated fleeing or attempting to elude a police officer cannot qualify as a "violent felony" within the meaning of the Armed Career Criminal Act ("ACCA"). Second, he submits that his prior juvenile adjudication cannot be used to enhance his

sentence beyond the statutory maximum because it was not obtained by a jury trial. For the reasons set forth in this opinion, we affirm the judgment of the district court.

I

BACKGROUND

In 2005, Devin Welch pleaded guilty to unlawful possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). The presentence report ("PSR") indicated that Mr. Welch had four prior convictions that were "violent felonies" for purposes of the ACCA: two aggravated batteries, aggravated fleeing or attempting to elude a police officer and a juvenile adjudication for attempted armed robbery. Without the ACCA's statutory enhancement, the statutory maximum sentence for Mr. Welch's crime was 120 months.

At sentencing, Mr. Welch's counsel made no objections to the PSR, but Mr. Welch submitted handwritten memoranda making objections pro se. One of those objections was to the use of the previous convictions to enhance his sentence. The district court overruled the objections and sentenced Mr. Welch to 180 months' imprisonment, to be followed by a five-year term of supervised release. The district court did not rely on one of the aggravated battery convictions – for spitting – but, as a result of the other three violent felonies, Mr. Welch was nonetheless subject to the ACCA's mandatory minimum sentence of 180 months' imprisonment.[1] *See* 18 U.S.C.

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[1] The Government concedes that if Mr. Welch's appeal is successful, he is entitled to be resentenced.

§ 924(e)(1). On direct appeal, Mr. Welch, through counsel, did not pursue any of the pro se objections. He contended only that the trial court had erred in failing to specify the number of required drug tests during the period of supervised release. We summarily affirmed the district court's judgment. *United States v. Welch*, No. 06-3385 (7th Cir. Feb. 21, 2007).

Mr. Welch next filed a pro se § 2255 motion. He contended that his conviction for aggravated fleeing or attempting to elude a police officer was not a violent felony because, under Illinois law, the offense is characterized as a "serious traffic offense but not something that presents a serious potential risk of physical injury to another." R.1 at 11.[2] He also contended that his juvenile adjudication could not be used to enhance his sentence beyond the statutory maximum consistent with the Sixth Amendment because it did not result from a jury trial; he also contended that his counsel had been ineffective for failing to raise this claim.[3]

The district court denied these aspects of the motion. In rejecting Mr. Welch's ACCA claim, it relied on *United States v. Howze*, 343 F.3d 919, 921 (7th Cir. 2003), in holding that flights to avoid arrest categorically created a serious potential risk of injury to another and were thus violent felonies. In rejecting Mr. Welch's ineffective assistance claim, it noted that, at the time of sentencing, the circuits were divided 3-1 against Mr. Welch's position, with the Se-

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[2] R.___ refers to the record of the § 2255 proceeding.

[3] Mr. Welch also again challenged the district court's drug testing ruling. This aspect of the motion was granted, and is not at issue in this appeal. Also, Mr. Welch raised other ineffective assistance challenges that are not renewed on appeal.

venth Circuit silent. Thus, it was reasonable for counsel to choose not to raise the issue. Moreover, Mr. Welch suffered no prejudice because he had raised the issue pro se.

We initially granted a certificate of appealability only on the issue of ineffective assistance. We subsequently expanded the certificate to include the issue of whether Mr. Welch's conviction for aggravated fleeing or attempting to elude a police officer properly was classified as a violent felony in light of the Supreme Court's decision in *Begay v. United States*, 553 U.S. 137 (2008).

II

ANALYSIS

A.

1.

Initially, we note that we have held that deviations from the Sentencing Guidelines generally are not cognizable on a § 2255 motion. *Scott v. United States*, 997 F.2d 340, 343 (7th Cir. 1993). Other circuits have reached a similar conclusion.[4] However,

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[4] *See, e.g., United States v. Mikalajunas*, 186 F.3d 490, 495-96 (4th Cir. 1999) (collecting cases); *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999) ("Moreover, an error in the application of the Sentencing Guidelines does not warrant collateral relief under § 2255 absent a complete miscarriage of justice."); *Burke v. United States*, 152 F.3d 1329, 1332 (11th Cir. 1998) ("We thus hold that a claim that the sentence imposed is contrary to a post-sentencing clarifying amendment is a non-constitutional issue that does not provide a basis for collateral relief in the absence of a complete miscarriage of justice."); *Gra-*

Scott does not govern the situation before us for two reasons. First, *Scott* relied, in significant part, on the text of § 2255, and suggested that the Guidelines were not "laws of the United States." *Id.* at 341; *see also Taylor v. Gilkey*, 314 F.3d 832, 833 (7th Cir. 2002) ("Because the Guidelines are not 'laws' for purposes of § 2255, however, this argument could not support relief."); *Brannigan v. United States*, 249 F.3d 584, 588 (7th Cir. 2001) (same). That rationale does not apply here because the statutory text clearly permits relief if "the sentence was in excess of the maximum authorized by law." 28 U.S.C. § 2255(a). Here, Mr. Welch pointedly argues that his sentence, as enhanced by the ACCA, *is* above the statutory maximum, which would entitle him to relief.[5]

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ziano v. United States, 83 F.3d 587, 590 (2d Cir. 1996) (collecting cases).

We also note that the Supreme Court has held that an error of law, as distinguished from a constitutional error, is cognizable under § 2255 only if it "constituted a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (internal quotation marks and citation omitted).

[5] *See United States v. Peterman*, 249 F.3d 458, 462 (6th Cir. 2001) ("Courts have generally declined to collaterally review sentences that fall within the statutory maximum."); *United States v. Pregent*, 190 F.3d 279, 284 (4th Cir. 1999) ("Thus, while § 2255 applies to violations of statutes establishing maximum sentences, it does not usually apply to errors in the application of the Sentencing Guidelines."); *Auman v. United States*, 67 F.3d 157, 161 (8th Cir. 1995) ("While section 2255 does provide relief for cases in which 'the sentence was in excess of the maximum authorized by law,' this provision applies to violations of statutes establishing maximum sentences, rather than garden-variety Sentencing Guideline application issues."); *cf. United States v. White*, 584 F.3d 935, 948 (10th Cir. 2009) (holding that appeal waiver made in a plea agreement results in a miscarriage of justice "where the sentence exceeds the statutory

Second, our decision in *Scott* was based in significant part on the difference between direct appeal and collateral attack, ultimately concluding "that arguments of the sort Scott proffers must be advanced on direct appeal or not at all." *Scott*, 997 F.2d at 343. However, "arguments of the sort" at issue here, where a change in law reduces the defendant's statutory maximum sentence below the imposed sentence, have long been cognizable on collateral review.[6]

Finally, we note that the Government has waived any procedural default argument by failing to address the issue in its brief. *See Torzala v. United States*, 545 F.3d 517, 522 (7th Cir. 2008) ("Because the government did not assert procedural default as a defense in this action but instead chose to respond on the merits, however, the government has waived the procedural default.").

2.

We next must consider whether the rule announced in *Begay*, that a crime must be similar in

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maximum" (citation omitted)); *United States v. Sisco*, 576 F.3d 791, 796 (8th Cir. 2009) (same); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009) (same).

[6] In *Davis v. United States*, 417 U.S. 333 (1974), a change in intervening law narrowed the petitioner's statute of conviction, potentially excluding petitioner's conduct. The Supreme Court held that:

> If [petitioner's] contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255.

Id. at 346-47 (brackets in original). As we shall demonstrate in the text, the situation before us is analogous.

kind to the enumerated offenses in order to qualify as a violent felony under the ACCA, is applicable under the Supreme Court's retroactivity framework. If it is, then the error of which Mr. Welch complains is cognizable in this collateral review proceeding.

New procedural rules that are established after a conviction becomes final generally do not apply on collateral review. *Teague v. Lane*, 489 U.S. 288, 310 (1989). New substantive rules, however, are not barred by the *Teague* rule. The Supreme Court has explained this distinction:

> New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.

Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004) (internal quotation marks and citations omitted, emphasis removed).

These substantive rules stand in contrast to procedural rules which:

> do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.

Id. at 352.

Our colleagues in the Tenth Circuit recently have addressed this substantive/procedural distinction. In *United States v. Shipp*, 589 F.3d 1084 (10th Cir. 2009), that court had to decide whether *Chambers v. United States*, ___ U.S. ___, 129 S. Ct. 687 (2009), is to be applied retroactively.[7] As we shall discuss in

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[7] One circuit granted a certificate of appealability on the question of *Begay*'s retroactivity as applied to the career offender Sentencing Guideline, but then held that "[b]ecause his status as a career offender is a non-constitutional issue that Coley could have raised on direct appeal, it is not cognizable on collateral review under § 2255." *United States v. Coley*, 336 Fed. Appx. 933, 935 (11th Cir. 2009) (per curiam).

One other circuit has stated in dicta that that circuit's holding that non-residential burglary is not per se a "crime of violence" under the Sentencing Guidelines is not retroactive. *United States v. Giggey*, 551 F.3d 27, 36 n.3 (1st Cir. 2008).

District courts have split on the question of *Begay* retroactivity. *Compare United States v. Ross*, No. 09-cv-779-bbc, 2010 WL 148397, at *4 (W.D. Wis. Jan. 12, 2010) (not retroactive); *United States v. Jones*, No. 6:09-7082-DCR, 2010 WL 55930, at *3-*6 (E.D. Ky. Jan. 4, 2010) (same); *Kirkland v. United States*, No. 3:09-CV-335 RLM, 2009 WL 3526185, at *8 (N.D. Ind. Oct. 22, 2009) (same); *United States v. Johnson*, No. 04-269 (MJD/AJB), 2009 WL 2611279, at *3-*4 (D. Minn. Aug. 24, 2009) (same); *Sun Bear v. United States*, No. CIV 08-3021, 2009 WL 2033028, at *3-*4 (D.S.D. July 9, 2009) (same); *United States v. Narvaez*, No. 09-cv-222-bbc, 2009 WL 1351811, at *1 (W.D. Wis. May 12, 2009) (same); *Lindsey v. United States*, No. 09-0249-CV-W-ODS, 2009 WL 2337120, at *2 (W.D. Mo. July 29, 2009) (same); *United States v. Campbell*, No. 6:06-812-HMH, 2009 WL 1254287, at *1 (D.S.C. May 1, 2009) (same), with *United States v. Fondren*, No. 4:06-CR-22 CEJ, 2009 WL 3246906, at *1 (E.D. Mo. Oct. 6, 2009) (retroactive); *Kendrick v. United States*, No. 5:08-cv-447-Oc-10GRJ, 2009 WL 2958976, at *2 (E.D. Fla. Sept. 15, 2009) (same); *United States v. Blue*, No. 09-1108, 2009 WL 2581284, at *3-*4 (D. Kan. Aug. 20, 2009)

detail later, *Chambers*, like *Begay*, interpreted the ACCA and narrowed the scope of "violent felony." The Tenth Circuit held that *Chambers* articulated "a

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(finding *Chambers* to be retroactive); *Frederick v. United States*, No. 08-22143-CV, 2009 WL 2488965, at *8 (S.D. Fla. Aug. 12, 2009) (retroactive) (adopting magistrate judge's report finding *Begay* to be retroactive); *McCarty v. United States*, No. 8:08-cv-1619-T-24TBM, 2009 WL 1456386, at *2 (M.D. Fla. May 22, 2009) (retroactive); *George v. United States*, 650 F. Supp. 2d 1196, 1200 (M.D. Fla. 2009) (same); *United States v. McElroy*, No. 09-CV-0040-CVE-PJC, 2009 WL 1372908, at *2-*3 (N.D. Okla. May 14, 2009) (same); *United States v. Radabaugh*, No. 08-CV-762-CVE-TLW, 2009 WL 565065, at *5 (N.D. Okla. Mar. 5, 2009) (same); *United States v. Leonard*, No. 08-CV-0389-CVE-FHM, 2009 WL 499357, at *3-*4 (N.D. Okla. Feb. 27, 2009) (same); *United States v. Glover*, No. 08-CV-0261-CVE-FHM, 2008 WL 2951085, at *4 (N.D. Okla. July 28, 2008) (same).

Those holding that the *Begay* rule is substantive have reasoned, just as the Tenth Circuit did, that "*Begay* limits the authority of a court to increase a defendant's punishment for certain types of conduct." *McElroy*, 2009 WL 1372908, at *3; see also *Frederick*, 2009 WL 2488965, at *8 (carrying a concealed firearm "is now categorically outside the reach of the federal statute"); *Blue*, 2009 WL 2581284, at *4 ("Defendants who have been sentenced on the basis of certain prior convictions may thus have been subjected to increased punishment that the law did not allow."); *McCarty*, 2009 WL 1456386, at *2 (holding that *Begay* "narrows the scope of § 924(e) by interpreting its terms, making the conduct for which Petitioner was sentenced no longer a valid basis for his sentence").

Those district courts holding that *Begay* is procedural have suggested that it "does not describe conduct that is beyond Congress' power to punish." *Lindsey*, 2009 WL 2337120, at *2. They also have contrasted "a new substantive rule" with "a rule of interpretation for determining the application of a sentencing enhancement under the Federal Sentencing Guidelines." *Sun Bear*, 2009 WL 2033028, at *4. At least one court has held that *Begay* is not retroactive because the Supreme Court has not said it is retroactive. *Campbell*, 2009 WL 1254287, at *1.

substantive rule of statutory interpretation." *Shipp*, 589 F.3d at 1089. A defendant who "does not constitute an 'armed career criminal' " after *Chambers* has "received 'a punishment that the law cannot impose upon him.' " *Id.* at 1091 (quoting *Schriro*, 542 U.S. at 352. Accordingly, the court held that Mr. Shipp's due process rights were violated and that he was entitled to collateral relief. *Id.*[8]

At the outset of our analysis, we recognize that, although *Begay* narrowed the scope of a criminal statute, it did not narrow any of the elements of a criminal offense. We also must recognize that Mr. Welch was convicted of, and punished for, unlawfully possessing a firearm, which is still criminal conduct after *Begay*. The question, therefore, is whether a statutory rule defining the scope of a sentencing enhancement that increases the maximum allowable statutory sentence on the basis of a prior conviction is properly classified as substantive.

There is significant merit to the Tenth Circuit's analysis. In essence, *Begay* narrowed substantially Mr. Welch's exposure to a sentence of imprisonment. Without the ACCA enhancement, Mr. Welch faced a statutory *maximum* of 10 years' imprisonment. With the ACCA enhancement, Mr. Welch faced a statutory *minimum* of 15 years' imprisonment. In short, the application of the ACCA imposed, at a minimum, five years of imprisonment that the law otherwise could not impose upon him under his statute of conviction. Such an increase in punishment is certainly a substantive liability. By contrast, such an increase in punishment hardly resembles a procedural device, as the term is used in *Schriro*. It does not address the

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[8] Notably, both parties agree that the *Begay* rule is substantive.

accuracy of the process afforded Mr. Welch; it addresses the degree to which the Government may punish him for his violation of the law.

No doubt, the change at issue here is not the same as the change at issue in *Schriro*. When the elements of a crime are narrowed, that change serves to prohibit any punishment for the conduct. *Begay* prohibits some of that punishment. We believe, however, that this distinction is one of degree, not one of kind. *Cf. McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005) (holding that *Booker* was not retroactive because "[n]o conduct that was forbidden before *Booker* is permitted today; no maximum available sentence has been reduced").

Therefore, the *Begay* rule is retroactively applicable on collateral review.

B.

We now turn to Mr. Welch's substantive contentions regarding *Begay*'s application. He submits that his conviction for the Illinois offense of aggravated fleeing or attempting to elude a police officer cannot qualify, consistent with *Begay*, as a "violent felony" within the meaning of the ACCA.

1.

We shall begin our analysis by reviewing the law relevant to the interpretation of the ACCA.

The ACCA provides in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on

> occasions different from one another, such person shall be . . . imprisoned not less than fifteen years . . . .

18 U.S.C. § 924(e)(1). The ACCA goes on to define "violent felony" as follows:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and
>
> (C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Id. § 924(e)(2)(B) & (C).

It is undisputed that the Illinois crime in question is punishable by imprisonment for a term exceeding one year,[9] and that it is not one of the crimes specifically enumerated in subsection (ii). Also, the

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[9] The statute provides that a first violation shall be a class 4 felony. 625 ILCS 5/11-204.1(b). A class 4 felony is punishable by a sentence of "not less than one year and not more than 3 years." 730 ILCS 5/5-4.5-45.

statute does not necessarily require the use, attempted use or threatened use of physical force against the person of another. Therefore, this case centers around the residual clause,[10] or whether the crime "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B)(ii).

In its analysis of the scope of the ACCA, the district court relied on *United States v. Howze*, 343 F.3d 919 (7th Cir. 2003). In that case, we held that all escapes, including fleeing a police officer in a vehicle, were violent felonies. *Id.* at 922. We held that escaping or fleeing presented a serious potential risk of physical injury to another. *Id.* We reasoned that "the [ACCA] calls for an assessment of risk rather than actual outcomes, and the risk that someone will get hurt during recapture (or flight to avoid recapture) does not depend on how the offender got away in the first place." *Id.* We further noted that "flight may be even more dangerous than escape" because "[c]ollisions between fleeing vehicles and pedestrians or others who get in the way are common." *Id.* Although "many escapes do not entail flight to avoid capture . . . all flights involve that risk-creating conduct." *Id.* (emphasis in original).

Howze was decided before the Supreme Court decided *Begay*. In *Begay*, the Court held that, in order to be classified as a violent felony, it is not sufficient that the offense present a serious potential risk of physical injury to another. Additionally, the offense must be "roughly similar, in kind" to the enumerated

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[10] The Supreme Court's recent decision in *Johnson v. United States*, ___ U.S. ___, 130 S. Ct. 1265 (2010), does not interpret this clause of the statute.

offenses. *Begay*, 553 U.S. at 143. The listed offenses, the Court noted, "typically involve purposeful, violent, and aggressive conduct" such that it makes it "more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." *Id.* at 144-45 (internal quotation marks and citation omitted). The offense before the Court, driving under the influence, did not require purposeful conduct, but was instead more akin to a strict liability crime. *Id.* at 145. DUI, therefore, did not show an increased likelihood that the offender would point a gun and pull the trigger. *Id.* at 146.

We applied the *Begay* framework to a fleeing statute in *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008). We held that fleeing an officer in a vehicle constituted a violent felony. *Id.* at 752. We held that the offense was "purposeful," because the statute required that it be done "knowingly or intentionally." *Id.* We also held that flight in a vehicle was inherently "aggressive." *Id.* "Taking flight calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit." *Id.*

After *Spells*, the Supreme Court decided *Chambers*. There, the Court held that failure to report for penal confinement is not a violent felony. Failure to report does not present a serious risk of physical injury to another, and it is "a form of inaction, a far cry from the purposeful, violent, and aggressive conduct potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion." *Chambers*, 129 S. Ct. at 692 (internal quotation marks and citation omitted). The Court also

noted that "an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct." *Id.* The Court also specifically distinguished failure to report from escape. *Id.* at 691.

After argument in the case now before us, we decided *United States v. Dismuke*, 593 F.3d 582 (7th Cir. 2010). In that case, we reconsidered whether the Wisconsin statute at issue in *Howze* could qualify as a violent felony in light of the Supreme Court's decisions in *Begay* and *Chambers*. Our focus was on a particular portion of that statute: the offense of "increasing the speed of the operator's vehicle or extinguishing the lights of the vehicle in an attempt to elude or flee." *Id.* at 590 (brackets omitted). We noted and reaffirmed, but did not rest upon, the *Spells* decision. We held that the Wisconsin statute required purposeful conduct because it required that the crime be done intentionally. *Id.* at 592. We also held that the conduct encompassed by the elements of the statute was violent and aggressive because it was "characterized by aggressive conduct with a similar potential for violence and therefore injury as the enumerated offenses." *Id.* at 594. We found in *Chambers* an implication that an escape from physical custody would satisfy *Begay* and cited several cases (including *Spells*) that explained how fleeing is a challenge to the officer's authority and is likely to result in a confrontation. *Id.* at 595.

Shortly after our decision in *Dismuke*, we decided *United States v. Sykes*, 598 F.3d 334 (7th Cir. 2010). That case involved the same Indiana statute as the one at issue in *Spells*. The defendant acknowledged our holding in *Spells*, but asked that we abandon it.

We declined the invitation and chose instead to reaffirm explicitly *Spells*. We stated that "its holding is good law and controls our case," and we noted the importance of stare decisis. *Id.* at 337.

2.

The Illinois statute under which Mr. Welch was convicted provides:

> The offense of aggravated fleeing or attempting to elude a peace officer is committed by any driver or operator of a motor vehicle who flees or attempts to elude a peace officer, after being given a visual or audible signal by a peace officer in the manner prescribed in subsection (a) of Section 11-204 of this Code, and such flight or attempt to elude:
>
> (1) is at a rate of speed at least 21 miles per hour over the legal speed limit;
>
> (2) causes bodily injury to any individual;
>
> (3) causes damage in excess of $300 to property; or
>
> (4) involves disobedience of 2 or more official traffic control devices.

625 ILCS 5/11-204.1(a).

Unlike the fleeing statutes at issue in *Spells*, *Dismuke* or *Sykes*, this Illinois statute does not contain an explicit intent term. Mr. Welch submits that, because of this omission, the offense cannot satisfy the *Begay* standard. *Begay* itself removed explicitly strict liability crimes from the ACCA's reach. *United States v. McDonald*, 592 F.3d 808, 814 (7th Cir. 2010). Indeed, *Begay* held that a violent felony must involve "purposeful" conduct, and we have held

squarely that a crime with a mens rea of recklessness cannot qualify as a violent felony under the residual clause. *United States v. Smith*, 544 F.3d 781, 786 (7th Cir. 2008). Therefore, in order to qualify as a violent felony, a crime must involve intentional conduct.

We believe that the Illinois statute, although not having an explicit requirement of intentional conduct, does contain an implied requirement of intentional conduct. In *Mei v. Ashcroft*, 393 F.3d 737, 741-42 (7th Cir. 2004), we considered whether this same Illinois statute was a "crime of moral turpitude" for purposes of immigration law. In that context, we found an implied intent requirement in the statute, reasoning that "[i]t would be unlikely for the aggravated version of the offense to have dropped the requirement of willfulness [when the unaggravated version did contain such a requirement], though not impossible." Although Illinois cases provide little guidance,[11] we think *Mei* was correct for several reasons.

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[11] In *People v. Brown*, 362 Ill. App. 3d 374, 298 Ill. Dec. 273, 839 N.E.2d 596, 600 (2005), the defendant contended that the evidence was insufficient to support his conviction for aggravated fleeing, because the State failed to prove that he drove 21 miles per hour over the speed limit "after becoming aware of any visual or audible signal to stop." The police officer testified that the squad car was marked and that its siren and lights were engaged. *See id.* at 601 ("The inference is clear that he activated his emergency lights and siren while pursuing defendant on Mackinaw."). The court held that this was sufficient to support the defendant's conviction, *id.* at 601, though it did not specify if this evidence allowed the jury to infer that the defendant was aware of the pursuing officer or if such awareness was not required.

First, the statute does not punish a driver who "fails to stop" for an officer, but rather one who "flees or attempts to elude" an officer. While a "failure to stop" could be an unintentional act, "fleeing" implies willfulness. As the term is commonly used, "fleeing" implies something more than continued motion; it implies a response to some stimulus. The transitive form of the verb "flee" is defined as "to run away *from*" or "shun." Merriam-Webster's Collegiate Dictionary 445 (10th ed. 1998) (emphasis added). This implication is even stronger where the statute treats "fleeing" as the equivalent of "attempting to elude," for "attempt" is a specific intent crime. *See* 720 ILCS 5/8-4(a).

Moreover, speeding or driving through two stop signs while being chased by an officer, *with no intent to flee the officer*, is not the type of conduct that a statute about "fleeing" is crafted to punish. Illinois has enacted other provisions – traffic offenses – to punish running stop signs or speeding. *See* 625 ILCS 5/11-305 (obedience to traffic-control devices); 625 ILCS 5/11-601 (speeding). These traffic offenses are not felonies, or even misdemeanors, but rather are petty offenses.[12] Illinois also makes it a separate misdemeanor to drive 40 miles per hour or more over the speed limit. 625 ILCS 5/11-601.5. Given this comprehensive statutory scheme, we believe it clear that the Illinois legislature did not intend to make it a felony to drive 20 miles per hour over the speed

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[12] [U]nless otherwise declared in this Chapter with respect to particular offenses, it is a petty offense for any person to do any act forbidden or fail to perform any Act required in this Chapter.

625 ILCS 5/11-202.

limit simply because a police officer happens to be in pursuit, rather than because the driver was intentionally evading that officer.

Similarly, Illinois has enacted no separate offense for causing injury while operating a vehicle. An individual who follows all rules of the road and drives carefully, but nevertheless somehow causes injury, has ordinarily committed no crime. We do not believe that the legislature intended to make this conduct criminal – and felonious, at that – unless the driver *actually* knew about the pursuit by an officer and was trying to flee.

Mr. Welch suggests that "imposing strict liability is common where the legislature's overriding concern is to protect the public from injury." Reply Br. 2-3. Of course, the inquiry cannot be that simple; nearly *all* criminal statutes are intended to protect the public from injury. We are mindful that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples v. United States*, 511 U.S. 600, 605 (1994) (quotation marks and citation omitted, brackets and italics in original). When interpreting federal statutes, the Supreme Court has dispensed with the mens rea requirement in a narrow class of statutes that it has termed "public welfare" statutes. *Id.* at 606. A key consideration in determining whether a statute falls within this class is whether a person would be surprised to learn that the conduct criminalized is not an innocent act. *Id.* at 610; *see also Morissette v. United States*, 342 U.S. 246, 260 (1952) ("In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." (quotation marks and citation omitted)).

Illinois has gone a step further in taking the guess-work out of the analysis. Its legislature has provided a statute stating that the legislature must make its purpose clear in order to create a strict liability crime punishable by imprisonment.[13]

Traffic offenses have been held to be prime candidates for strict liability because such offenses:

> [r]esult in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or

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[13] 720 ILCS 5/4-9 provides:

> A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in Sections 4-4 through 4-7 if the offense is a misdemeanor which is not punishable by incarceration or by a fine exceeding $500, or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

Driving under the influence, likened to a strict liability crime in *Begay v. United States*, 553 U.S. 137, 145 (2008), evinces such a clear purpose because of a sub-section of the statute that specifically precludes a defense that use of the drug in question was lawful. *People v. Teschner*, 76 Ill. App. 3d 124, 31 Ill. Dec. 691, 394 N.E.2d 893, 895 (1979). For the reasons stated in the text, we do not see a clear intent to make aggravated fleeing a strict liability crime.

> not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element.

People v. Teschner, 76 Ill. App. 3d 124, 31 Ill. Dec. 691, 394 N.E.2d 893, 894-95 (1979) (quoting *Morissette*, 342 U.S. at 256 (brackets in original).

We must acknowledge that traffic offenses generally are considered public welfare offenses, *see id.* at 895, and that the offense at issue here is situated physically in the Illinois Vehicle Code. Nevertheless, these factors cannot control whether the offense requires a criminal intent. The statute in question simply does not meet the requirements imposed by the Illinois legislature before the usual requirement of a criminal intent can be considered absent. There is certainly no specific indication by the Illinois legislature that an intent requirement is absent. Indeed, the entire statutory scheme indicates the opposite. First, the non-aggravated form of the same offense requires a criminal intent. It indeed would be unusual for the legislature to require a specific intent to punish the less serious degree of the violation, while making the more serious violation an absolute liability offense.[14]

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[14] We cannot accept Mr. Welch's argument that *Dean v. United States*, ___ U.S. ___, 129 S. Ct. 1849 (2009), requires a different view. There, the Supreme Court declined to find an implied mens rea requirement in a statute criminalizing discharge of a firearm during a crime of violence. Mr. Welch notes that one consideration relied on by the Court was that the statute also criminalized the brandishing of a firearm during a crime of violence, and "brandish[ing]" was a defined term; the statute required that it be done "in order to intimidate" someone. *Id.* at 1853. Thus, the "brandish" provision had an intent requirement

that suggested the absence of an intent requirement from the "discharge" provision to be intentional. *Id.* at 1854. Similarly here, Mr. Welch argues, the offense of unaggravated fleeing contains an intent term – "willfully" – while the aggravated offense does not. Therefore, Mr. Welch contends, the omission of an intent term from the aggravated offense must have been intentional.

We note first that this consideration was just one among many for the Court. In *Dean*, the statute's use of the passive voice also indicated that proof of intent was not required, *id.* at 1853, and the presumption that proof of criminal intent is required was not a factor in the case because, although "[i]t is unusual to impose criminal punishment for the consequences of purely accidental conduct," "it is not unusual to punish individuals for the unintended consequences of their *unlawful acts*," such as committing a robbery with a loaded gun, *id.* at 1855 (emphasis in original). Neither of these considerations are relevant to the Illinois statute.

Additionally, the term "brandish" appeared in subsection (ii) of the *Dean* statute ("if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years"), while "discharge" appeared in subsection (iii) ("if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years"). *Id.* at 1853 (citation omitted). The Court noted that the subsections "explain how defendants are to be sentenced" for the complete offense of using a firearm in relation to a crime of violence or a drug trafficking crime. *Id.* (quotation marks and citation omitted). The Illinois offenses of aggravated and unaggravated fleeing, however, do not have the same conceptual or structural relationship. They define two separate offenses. The unaggravated offense appears in Section 11-204 of the Illinois Vehicle Code and is a class A misdemeanor; the aggravated offense appears in Section 11-204.1 and is a class 4 felony.

Even without assistance from *Dean*, Mr. Welch may contend that the omission of an explicit intent term from the aggravated offense was intentional in light of the unaggravated offense. However, the unaggravated and the aggravated offense are not structured in the same way. The unaggravated offense punishes one who:

Secondly, deeming aggravated fleeing an absolute liability offense would be incongruous with the general scheme that Illinois has crafted to regulate driving a motor vehicle within the state. Notably, the penalty for aggravated fleeing is much more severe than for a typical traffic offense. Even DUI is only a Class A misdemeanor for the first two offenses, punishable by a maximum of one year in prison. 625 ILCS 5/11-501(c)(1), (d)(1)(A), (d)(2)(A), 730 ILCS 5/5-4.5/55. Moreover, and perhaps most importantly, the injury caused by aggravated fleeing is simply not the same without intent: Aggravated fleeing punishes, in part, the defiance of police authority. If the driver is unaware of the officer and not acting with an intent to flee, there is no defiance to punish.

We recognize that some state statutes refer to "willful fleeing." *See, e.g.*, Cal. Vehicle Code § 2800.1(a) ("Any person who, while operating a motor vehicle and with the intent to evade, willfully flees . . . ."); Idaho Code Ann. § 49-1404(1) ("Any driver of a motor vehicle who wilfully flees or attempts to elude a pursuing police vehicle . . . ."). But given the common meaning of "flee," the presence of other Illinois statutes, and the general presumption against strict liability crimes, we do not see a clear

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> wilfully fails or refuses to obey such direction [to stop], increases his speed, extinguishes his lights, or otherwise flees or attempts to elude the officer . . . .
>
> 625 ILCS 5/11-204.

The most natural reading of this provision is that "willfully" modifies the first three clauses, all of which are forms of "flee[ing] or attempt[ing] to elude the officer." After all, increasing speed and extinguishing lights are easily done unintentionally. Because some drivers are quite inattentive, basic failure to stop is also conceivably done unintentionally. Intent turns these acts into something else: flight.

intent on the part of the Illinois legislature to impose strict liability.

Therefore, we conclude that the Illinois statute requires purposeful conduct.[15]

3.

Having concluded that the Illinois statute requires purposeful conduct, we now address whether the conduct proscribed by the statute is violent and aggressive as those terms are employed in the Supreme Court's recent interpretations of the ACCA. We begin our inquiry by returning to the language of the statute.

a.

The Illinois aggravated fleeing statute criminalizes four distinct varieties of flight. In evaluating whether this *aggravated* fleeing conduct is violent and aggressive, our first task is to determine, if possible, the precise offense with which we are concerned. Our approach to this problem of divisibility was set out, in plenary fashion, in *United States v. Woods*, 576 F.3d 400 (7th Cir. 2009); *see also Shepard v. United States*, 544 U.S. 13, 26 (2005). We must employ a categorical approach; we do not look at the facts of the prior conviction. Rather, we look only at

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[15] In addition to the foregoing, the Government refers us to the Illinois Pattern Jury Instructions, which indicate that aggravated fleeing requires intent. Ill. Pattern Jury Instructions Crim. 23.03 (2000). These are not the law, however, and are therefore entitled to little weight. *See People v. Peete*, 318 Ill. App. 3d 961, 252 Ill. Dec. 821, 743 N.E.2d 689, 695 (2001) ("Illinois pattern jury instructions are not binding. [They] are used only when they accurately state the law.").

the statutory definition of the crime. *Woods*, 576 F.3d at 403. In examining the elements of the crime, we consider whether, in the ordinary case, they reflect a violent felony. *Id.* at 404. When a statute may be violated in several ways and only some of those ways constitute a violent felony within the meaning of the ACCA, we may consider a limited list of additional materials to ascertain the precise branch of the statute which the defendant violated: "the terms of the charging document, the terms of a plea agreement or transcript of a colloquy between judge and defendant . . . or to some comparable judicial record of this information." *Id.* at 404 (quotation marks and citation omitted). This consultation is limited to determining which branch of the statute the defendant violated; it is not an examination of the defendant's conduct. *Id.* at 405.

The Illinois aggravated fleeing statute makes fleeing from a police officer an aggravated offense if one of four conditions are met. Those conditions are that the fleeing:

> (1) is at a rate of speed at least 21 miles per hour over the legal speed limit;
>
> (2) causes bodily injury to any individual;
>
> (3) causes damage in excess of $300 to property; or
>
> (4) involves disobedience of 2 or more official traffic control devices.

625 ILCS 5/11-204.1(a). In light of the principles that we have set forth, this statutory scheme would appear, at least on first reading, to present a difficult problem. The record does not contain the state court papers pertaining to the aggravated vehicular fleeing

conviction. It does contain a description of the offense in the PSR, but that description is based on arrest reports. Arrest reports are not authorized sources for divisibility purposes. *Shepard*, 544 U.S. at 16 (holding that a police report cannot be considered to determine whether generic burglary was committed). They cannot be made a permissible source because they are referenced in a PSR. *See United States v. Hays*, 526 F.3d 674, 678 (10th Cir. 2008); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc). Therefore, under the circumstances here, we must determine that all four branches constitute violent felonies under *Begay* in order to conclude that aggravated fleeing is a violent felony.

When we examine each of the branches, we note at the outset that they fall into two subcategories. Branch one (rate of speed at least 21 miles per hour over the legal speed limit) and branch four (disobedience of two or more traffic signals) describe the manner of the defendant's flight. On the other hand, branch two (causes bodily injury to any individual) and branch three (causes damage in excess of $300 to property) describe the effect of the flight.

If the violent nature of the felony turned solely on these factors, we might have significant difficulty in categorizing the offense of aggravated fleeing as violent and aggressive, as *Begay* and *Chambers* define those terms. Branches one and four are the easier of the two categories to reconcile with *Begay* and *Chambers*, but even these are problematic. Fleeing at a pace well over the speed limit or running through traffic signals reasonably may be characterized as violent and aggressive acts, comparable to brandishing a deadly weapon. They demonstrate,

it might be argued, a level of indifference to human safety above and beyond the basic act of fleeing and, in that respect, simply constitute specific, objective examples of action that creates a substantial risk of serious physical injury or death to any person.[16] On the other hand, under Illinois law, exceeding the speed limit by 40 miles per hour is a misdemeanor;[17] reckless driving, which requires "willful or wanton disregard for the safety of persons or property," is a misdemeanor as well.[18] Given these features of the Illinois code, it may be difficult to maintain that exceeding the speed limit by twenty miles an hour constitutes aggressive and violent behavior.

Branches two and three speak to the *results* of the flight, not its manner and are an even more problematic basis for characterizing an offense as aggressive and violent. While these results may indeed be the product of aggressive and violent behavior, they can be the results of other behavior as well. These results cannot be considered an easy and identifiable proxy for the sort of conduct that must form the basis of a violent felony for purposes of the ACCA.

We believe, however, that there is another and more appropriate approach to this Illinois statute that is more in harmony with the intent of Congress in the ACCA and with the interpretative decisions of the Supreme Court. The Illinois statute before us, while requiring that the conditions we have just de-

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[16] *See United States v. Hudson*, 577 F.3d 883, 885 (8th Cir. 2009) (holding that fleeing statute that prohibited fleeing in a manner that "creates a substantial risk of serious physical injury or death to any person" was a violent felony).

[17] 625 ILCS 5/11-601.5.

[18] 625 ILCS 5/11-503.

scribed be met, also requires, for all of these categories, that the defendant intentionally flee a police officer after having been signaled to stop. If this common underlying activity – the very act of intentionally fleeing in defiance of the officer's command – constitutes an aggressive and violent act, the crime is an aggressive and violent one, no matter which of the categories we have discussed is also applicable. Indeed, those categories are, under this analytical approach, simply *limitations* on the operation of the statute that make it applicable only to certain intentional flights from a police officer. However, if all intentional flights against the orders of an officer are aggressive and violent, those limitations are not relevant to our inquiry under the ACCA.

b.

We turn then to an analysis of whether all intentional flights against the order of a police officer are aggressive and violent as those terms are employed in an analysis of the ACCA.

This is not the first time that we have examined whether intentional flight in defiance of a police officer's order is an aggressive and violent act. This question was before us in *Spells*. In that case, we held that an Indiana vehicular fleeing statute qualified as a violent felony under the *Begay* framework. The Indiana statute required that the offender "knowingly . . . flee [ ] from the law enforcement officer after the officer has . . . ordered the person to stop." *Spells*, 537 F.3d at 749 (citation omitted).

Our task therefore is to ascertain whether our decision in *Spells* remains viable after the Supreme Court's decision in *Chambers*. An examination of

Chambers makes clear that it leaves *Spells* undisturbed. *Chambers* held that the offense of failure to report to confinement is not a violent felony. The other federal courts have extended *Chambers* to cover a "walkaway" escape, where a prisoner leaves unsecured custody such as a halfway house.[19] Numerous courts have reaffirmed, however, that an escape from secure custody is not analogous to failure to report and, therefore, is not covered by *Chambers*. For instance, the First Circuit held that "escape from secure custody is a stealth crime that is likely to cause an eruption of violence if and when it is detected. Therefore, the 'powder keg' rationale still applies to such a crime." *United States v. Pratt*, 568 F.3d 11, 22 (1st Cir. 2009). The Eighth Circuit has agreed. *United States v. Pearson*, 553 F.3d 1183, 1186 (8th Cir. 2009) ("Accordingly, *Chambers* overrules this circuit's precedent that all escapes – including failures to return or report to custody – are crimes of violence, but leaves intact our precedent holding that

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[19] *See United States v. Ford*, 560 F.3d 420, 426 (6th Cir. 2009) ("Ford committed a 'walkaway' escape, which no doubt may create a greater risk of physical injury than a failure to report, but which remains different from a jailbreak and other crimes of violence both in kind and in its risk of physical injury to others."); *United States v. Pappan*, 315 Fed. Appx. 677, 681 (10th Cir. 2009) (holding that escape statute is not a violent felony where it can be violated if defendant signed out of corrections facility for purpose of attending work but failed to attend work); *United States v. Lee*, 586 F.3d 859, 874 (11th Cir. 2009) ("In sum, we hold that a nonviolent walkaway escape from unsecured custody is not [a violent felony]."); *United States v. Charles*, 667 F. Supp. 2d 1246, 1258-59 (D. Kan. 2009) (treating walkaway escape as escape from non-secure custody, and finding it not to be a crime of violence).

escape from custody is a crime of violence.").[20] We also employed this rationale in *Dismuke* when we stated: "*Chambers* implies that unlike a failure to report, which does not have these characteristics [aggressive conduct with potential for violence], an escape from physical custody would [qualify as a violent felony]." *Dismuke*, 593 F.3d at 595; *see also Sykes*, 598 F.3d 334, 337 (stating that *Spells*'s "reasoning has been implicitly affirmed in *Chambers*").

The conclusion that *Chambers* did not disturb our holding in *Spells* is supported by the language of *Chambers*, which explicitly distinguished failure to report from escape from confinement. *Chambers*, 129 S. Ct. at 691. Vehicular fleeing, the offense at issue here, is much more similar to the latter. While failure to report is a passive crime characterized by inaction, *id.* at 692, vehicular fleeing necessarily involves affirmative action on the part of the perpetrator. As the Court pointed out, one who fails to report is not drawing attention to himself. *Id.* Similarly, a walkaway can occur without being detected until later. If an offender fails to report or leaves while beyond the presence of security, there is no immediate pursuit or other attempt to apprehend and

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[20] Also, since *Chambers*, the Fifth and Sixth Circuits have held that fleeing by vehicle is a violent felony. *United States v. Harrimon*, 568 F.3d 531, 534-35 (5th Cir. 2009); *United States v. Young*, 580 F.3d 373, 377-78 (6th Cir. 2009). The Tenth Circuit has reaffirmed an earlier decision to the same effect. *United States v. Wise*, 597 F.3d 1141, 1147 (10th Cir. 2010). The Eleventh Circuit, after *Chambers*, has found aggravated fleeing to be a violent felony. *United States v. Harris*, 586 F.3d 1283, 1288-89 (11th Cir. 2009). *But see United States v. Harrison*, 558 F.3d 1280, 1296-98 (11th Cir. 2009) (relying in part on *Chambers* to hold that unaggravated vehicular fleeing offense is not a violent felony).

none of the risks attendant with an immediate pursuit. By contrast, one who flees a police officer in a vehicle draws attention to himself, challenges the immediate authority of the police officer and calls on the officer to give immediate chase. Whether the officer accepts that invitation, the perpetrator takes action to elude capture with his vehicle, action that, by its very nature, endangers others. Indeed, Mr. Welch has emphasized that he does not contest the risk of physical harm posed by vehicular fleeing. Reply Br. 2 ("Welch has not argued that aggravated fleeing does not present a serious potential risk of injury to others.").

Spells must be read, moreover, in light of our decision in *Dismuke*. There, instead of simply relying on Spells, we considered anew the application of *Begay* to vehicular fleeing statutes. We specifically held "that the 'violent and aggressive' limitation requires only that a residual-clause predicate crime be characterized by aggressive conduct with a similar potential for violence and therefore injury as the enumerated offenses." *Dismuke*, 593 F.3d at 594. We understood Chambers as supporting this holding. *Id.* at 595. We noted as well that, in *Howze*, we had held that vehicular fleeing categorically posed a serious risk of physical injury. Indeed, we reaffirmed that vehicular fleeing presents a serious risk of physical injury to another. *Id.* at 591 n.3. Spells's holding that vehicular fleeing is aggressive conduct is not only undisturbed but reaffirmed by *Dismuke*. The same must be said of its holding that:

> An individual's purposeful decision to flee an officer in a vehicle when told to stop, reflects that if that same individual were in possession of a firearm and asked to stop by police,

> [he] would have a greater propensity to use that firearm in an effort to evade arrest.

Spells, 537 F.3d at 752.

Spells, *Dismuke* and *Sykes* make clear that we stand with the majority of circuits that have held that intentional vehicular fleeing is a violent felony within the meaning of the ACCA.[21] Accordingly, we hold that the district court correctly considered the defendant's conviction for aggravated vehicular fleeing a violent felony for purposes of the ACCA.

C.

Mr. Welch submits that he received ineffective assistance of counsel, at sentencing and on appeal, when counsel failed to argue that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Mr. Welch's prior nonjury juvenile adjudication could not be used to enhance his sentence beyond the statutory maximum. To succeed on this claim, Mr. Welch must demonstrate that (1) counsel's performance was below an objective standard of reasonableness, and (2) but for the deficiency, there is a reasonable probability that the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Because Mr. Welch must satisfy both prongs in order to prevail, we need not reach the deficiency inquiry because Mr. Welch has failed to establish prejudice.

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[21] *See Wise*, 597 F.3d 1141, 1147; *Young*, 580 F.3d at 377-78; *Harrimon*, 568 F.3d at 534-35; *United States v. West*, 550 F.3d 952, 971 (10th Cir. 2008). *But see United States v. Tyler*, 580 F.3d 722, 726 (8th Cir. 2009); *Harrison*, 558 F.3d at 1295.

Initially, the Government argues that Mr. Welch suffered no prejudice from his counsel's failure to raise the issue at sentencing because Mr. Welch raised the issue pro se. As a result, "[t]he district court carefully considered the claim but ultimately rejected it." Government's Br. 22. We cannot accept this argument. In his written objections, Mr. Welch preserved the issue of whether *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), was correctly decided. Additionally, he asked the court to "please consider that at the age of 16 I was young and remiss[ ]." R.18 at 4. At the sentencing hearing, the court understood Mr. Welch to be arguing that it had discretion to decline to consider the juvenile offense and that the offense did not meet the *statutory* definition of violent felony; Mr. Welch confirmed this. There was no specific *Apprendi* argument with respect to the juvenile offense. We cannot say, therefore, that the district court confronted squarely the issue that Mr. Welch now raises.

In order to show *Strickland* prejudice, Mr. Welch must show a reasonable probability that his underlying argument would have been accepted at the sentencing hearing. Strictly speaking, this standard does not require that we actually decide the merits of the underlying issue. However, in the context of this specific issue, considerations of judicial economy counsel that we address the underlying issue and decide it.

In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Mr. Welch contends that his prior juve-

nile adjudication, which was not obtained by a jury, is not a "prior conviction" for *Apprendi* purposes.[22]

The majority of circuits that have examined the question of whether the absence of a jury trial prevents the use of a juvenile adjudication to enhance a sentence under the ACCA have concluded that there is no such barrier.[23] After studying the opinions of the circuits that have addressed the matter, we join the majority.

When the Supreme Court carved out of its holding in *Apprendi* an exception allowing for the use of prior convictions, the Court believed that the procedural safeguards surrounding such a conviction gave it sufficient reliability that further protections were not required. Specifically, the Court relied upon the "certainty that procedural safeguards attached to any 'fact' of prior conviction . . . mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum statutory range." *Id.* at 488. The Court further said that:

> there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the

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[22] Mr. Welch pleaded guilty to his federal offense of conviction. Because his juvenile adjudication was not charged in the indictment, however, it may not be used to enhance his sentence if it is subject to the *Apprendi* rule. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

[23] The ACCA explicitly permits the use of otherwise qualifying juvenile convictions to enhance sentences.

> judge to find the required fact under a lesser standard of proof.

Id. at 496.

Our colleagues in the Ninth Circuit were the first to address whether the Supreme Court's discussion in *Apprendi* barred the use of any juvenile adjudication to enhance a sentence under the ACCA. *See United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001). A majority of the panel took the view that the Supreme Court intended to bar the use of such juvenile adjudications. In reaching its conclusion, the Ninth Circuit found particularly convincing a passage in the Supreme Court's opinion in *Jones v. United States*, 526 U.S. 227 (1999):

> "One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . *a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees.*"

Tighe, 266 F.3d at 1193 (quoting *Jones*, 526 U.S. at 249) (brackets and emphasis in *Tighe*). The Ninth Circuit concluded that the use of prior convictions to enhance a sentence "was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt and the right to a jury trial." *Id.*

The Ninth Circuit also found guidance in the passage from *Apprendi* that we have previously quoted:

> "There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof."

Id. at 1194 (quoting *Apprendi*, 530 U.S. at 496).

Thus, the court concluded that " *Apprendi*'s . . . 'prior conviction' exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt." *Id.* Recognizing that juvenile adjudications did not typically result from a jury trial, they were excluded.

The dissenting judge in *Tighe* took another view. For the dissent, the language from *Jones* meant only that "Congress has the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the predicate crime." *United States v. Tighe*, 266 F.3d 1187, 1200 (9th Cir. 2001) (Brunetti, J., dissenting). The dissent reasoned that "where a juvenile received all the process constitutionally due at the delinquency proceeding stage," the resulting adjudication could be used to justify an enhancement because "[t]o hold otherwise would have required the court 'to hold that the enhancement of an adult criminal sentence requires a higher level of due process protection than the imposition of a juvenile sentence.' " *Id.* at 1198-99 (citation omitted).

With the benefit of the dialogue initiated by the thoughtful writings in *Tighe*, our colleagues in many other circuits have had subsequent opportunities to analyze this issue. As we have noted previously, they have found the dissenting position in *Tighe* to be more convincing and, along the way, have refined the rationale supporting that position. For instance, the Court of Appeals for the Eighth Circuit expressed doubt that the Supreme Court in *Apprendi* intended to establish a rigid prerequisite for the definition of the sort of judgment of conviction that would qualify for the exception to its holding. The Eighth Circuit noted that "while the Court established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles." *United States v. Smalley*, 294 F.3d 1030, 1032 (8th Cir. 2002). The Eighth Circuit did not interpret the *Jones* passage as establishing a rigid definition of "prior conviction." *Id.* Rather, the Eighth Circuit believed that the proper inquiry was the overall reliability of a conviction – "whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption." *Id.* at 1033. The court concluded that juvenile adjudications qualified for an exemption from the *Apprendi* rule because defendants in those proceedings have the right to notice, the right to counsel, the right to confront witnesses, the right to proof beyond a reasonable doubt and the privilege against self-incrimination. *Id.* In its view, the use of a jury "would 'not strengthen greatly, if at all, the fact-finding function.' " *Id.* (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971) (plurality opinion)).

In the wake of *Smalley*, several other circuits have followed the same theme.[24] The Fourth Circuit, for instance, refused to say that the fact-finding process in a judge-imposed juvenile adjudication was so suspect that it could not be considered reliable when employed to enhance a later criminal sentence. *See United States v. Wright*, 594 F.3d 259, 264 (4th Cir. 2010). If a judge-imposed juvenile adjudication is considered to be a constitutionally sufficient basis for depriving a juvenile of his liberty for a significant period of time, reasoned the court, there is no need to consider that adjudication "off limits for sentencing consideration if the same juvenile later violates § 924(e)'s armed career criminal prohibition." *Id.* "As a jury is not required in a juvenile adjudication on the merits, we see no reason to impose such a requirement through the back door by allowing former juveniles who have subsequently reached adulthood to overturn their adjudications in subsequent sentencing hearings." *Id.* at 263-64; *see also United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007) ("Juvenile adjudications, where the defendant has the right to notice, the right to counsel, the privilege against self-incrimination, the right to confront and cross-examine witnesses, and the right to a finding of guilt beyond a reasonable doubt, provide sufficient procedural safeguards to satisfy the reliability requirement that is at the heart of *Apprendi*."). This

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[24] State courts have followed *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), as well. *See State v. Weber*, 159 Wash. 2d 252, 149 P.3d 646, 653 (2006); *State v. McFee*, 721 N.W.2d 607, 619 (Minn. 2006); *Ryle v. State*, 842 N.E.2d 320, 323 (Ind. 2005); *State v. Hitt*, 273 Kan. 224, 42 P.3d 732, 740 (2002). *But see State v. Harris*, 339 Or. 157, 118 P.3d 236, 246 (2005); *State v. Brown*, 879 So. 2d 1276, 1290 (La. 2004).

same rationale found acceptance in the Third and Eleventh Circuits. *See United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) ("It follows that if Lester Jones was afforded all the procedural safeguards that he is constitutionally due, the District Court properly enhanced his sentence pursuant to the ACCA."); *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005) ("We base our holding on the reasoning of our sister circuits in *Smalley* and *Jones*.").[25]

We agree with these circuits that a prior juvenile adjudication is a "prior conviction" under *Apprendi*. We do not believe *Apprendi* or Jones signals the Supreme Court's distrust of the factual integrity of juvenile adjudications that conform to the constitutional requirements for such proceedings. *See McKeiver*, 403 U.S. at 528; *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967). In this respect, we note that the Court in *Apprendi* stated:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached.

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[25] The First Circuit also has permitted the use of juvenile adjudications to enhance a sentence, but that case does not inform our inquiry because it confronted a situation where state law provided juveniles with the right to a jury trial. *United States v. Matthews*, 498 F.3d 25, 35 (1st Cir. 2007).

530 U.S. at 484. We believe that this passage is best read as requiring that a defendant must receive all the protections to which he is entitled. Prior convictions are not subject to the *Apprendi* rule if the defendant received all the protections to which he was constitutionally entitled, and the integrity of the fact-finding procedures are thereby ensured. There can be no doubt that the Supreme Court's jurisprudence has been vigilant with respect to the fact-finding processes of juvenile proceedings. "The same considerations that demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child." *Winship*, 397 U.S. at 365. Nevertheless, although emphasizing that a "proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution," *Gault*, 387 U.S. at 36, the Supreme Court clearly has held that juvenile adjudications meet constitutional standards even when they do not include a jury trial, *McKeiver*, 403 U.S. at 545-47. We agree with other circuits that the protections juvenile defendants receive – notice, counsel, confrontation and proof beyond a reasonable doubt – ensure that the proceedings are reliable.

Therefore, because juvenile adjudications are reliable, they are not subject to the *Apprendi* rule. Because Mr. Welch's juvenile conviction was admissible to enhance his sentence under the ACCA, he was not prejudiced by the failure of his attorney to argue the contrary. Accordingly, his ineffective assistance of counsel claim must fail.

Conclusion

Mr. Welch's prior conviction for the Illinois offense of aggravated fleeing or attempting to elude a police officer was properly treated as a "violent felony" under the ACCA, as was his prior juvenile adjudication. His sentence therefore was imposed in accordance with governing legal principles, and the judgment is accordingly affirmed.

AFFIRMED

POSNER, Circuit Judge, dissenting.

The defendant pleaded guilty to a charge of illegal possession of a gun by a felon, in violation of 18 U.S.C. § 922(g)(1), for which the maximum prison sentence ordinarily would have been 120 months. 18 U.S.C. § 924(a)(2). But the judge, because he found that the defendant had prior convictions for three "violent felonies," was required by the Armed Career Criminal Act to impose a sentence of at least 15 years, 18 U.S.C. § 924(e)(1), and did so. We affirmed in an unpublished order. *United States v. Welch*, No. 06-3385 (7th Cir. Feb. 21, 2007). The following year the defendant moved to vacate his sentence under 28 U.S.C. § 2255. One ground of his motion was that his lawyer had rendered ineffective assistance to him in failing to challenge the use of two of the "violent felony" convictions – a juvenile conviction and a conviction for "aggravated fleeing" – to increase his sentence.

There is no doubt that the lawyer was ineffective in failing on appeal to challenge the use of the juvenile conviction. That was a substantial issue, which had never been resolved by this court, while the only

other issue he raised on appeal related to drug testing in the period of supervised release that will follow the defendant's release from prison, an issue of little consequence in view of the length of his sentence. My colleagues have elided the issue of ineffective assistance by addressing the merits of the challenge to the use of the juvenile conviction and holding that the challenge fails, so that the defendant wasn't harmed by the lawyer's inadequacy. And the government concedes that the status of aggravated fleeing under the Armed Career Criminal Act is independently reviewable under 28 U.S.C. § 2255(f)(3) in light of the Supreme Court's decision in *Begay v. United States*, 553 U.S. 137 (2008), because, as a result of that decision, there is "a significant risk that [the] defendant . . . faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004).

I don't think that either the juvenile conviction or the conviction for aggravated fleeing was a conviction of a "violent felony" within the meaning of the Armed Career Criminal Act.

At age 16 the defendant was adjudged in an Illinois juvenile court to have attempted an armed robbery. He had no right to trial by jury. 705 ILCS 405/5-101(3); *People v. Taylor*, 221 Ill. 2d 157, 302 Ill. Dec. 697, 850 N.E.2d 134, 140 (2006). The Supreme Court had ruled in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," unless the defendant waived these rights. *See also Shepard v. United States*, 544 U.S. 13, 24-26 (2005); *United States v. Browning*, 436

F.3d 780 (7th Cir. 2006). An initial question is whether the judgment in the defendant's juvenile-court proceeding was a "prior conviction" for *Apprendi* purposes. Technically it was not a "conviction" at all, because in Illinois as in other states a juvenile-court proceeding, though it often results in a period of confinement (imprisonment by another name), is not deemed a criminal proceeding. *People v. Taylor*, *supra*, 302 Ill. Dec. 697, 850 N.E.2d at 141. And "because delinquency proceedings are not criminal proceedings, not all criminal safeguards have been employed in the juvenile proceeding. For example, a minor has no right to a jury trial, in part, because a jury trial would invest a juvenile proceeding with the appearance and form of a criminal trial." *In re R.G.*, 283 Ill. App. 3d 183, 218 Ill. Dec. 699, 669 N.E.2d 1225, 1227 (1996). Obviously, though, such a proceeding is more akin to a criminal proceeding than to a conventional civil proceeding when the minor's liberty is at stake. *See id.* at 1227-28; *see also State v. Bloomer*, 122 Ohio St. 3d 200, 909 N.E.2d 1254, 1266 (2009). It is best described as "quasi-criminal," as in *In re B.L.D.*, 113 S.W.3d 340, 351 (Tex. 2003).

The Supreme Court has held that no jury is required in a juvenile case, even though the outcome of such a case may well be imprisonment. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). The Court noted the "idealistic" hope that the rehabilitation of juvenile offenders would be assisted by avoiding the criminal label and the criminal courts, and while recognizing the failure of the movement to live up to its ideals, the Court decided not to terminate the experiment by requiring that all elements of criminal procedure be followed in juvenile proceedings. *Id.* at 545-51 (plurality opinion).

But whether a juvenile can be imprisoned on the basis of findings made by a juvenile-court judge rather than by a jury is different from whether a "conviction" so procured (if it should even be called a "conviction") is the kind of "prior conviction" to which the Court referred in *Apprendi*, namely a conviction that can be used to jack up a person's sentence beyond what would otherwise be the statutory maximum. The government doesn't even argue that it should be usable for this purpose; its entire argument is that because all but one of the circuits to have opined on the issue deem a juvenile-court "conviction" a "prior conviction" within the meaning of *Apprendi* – compare *United States v. Crowell*, 493 F.3d 744, 749-51 (6th Cir. 2007); *United States v. Burge*, 407 F.3d 1183, 1187-91 (11th Cir. 2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003); and *United States v. Smalley*, 294 F.3d 1030, 1031-33 (8th Cir. 2002); see also *United States v. Matthews*, 498 F.3d 25, 32-36 (1st Cir. 2007), with *United States v. Tighe*, 266 F.3d 1187, 1191-95 (9th Cir. 2001) – the failure of the defendant's lawyer to raise the issue didn't hurt the defendant because we would be unlikely to reject the majority position. That is a feeble argument, since our court does not mechanically decide a case on the basis of the circuit scorecard, without independent consideration of the issues.

The sentence I quoted from *Apprendi* implies that a prior conviction used to increase the length of the sentence must be the outcome of a proceeding in which the defendant had a right to have a jury determine his guilt. Otherwise why does the Supreme Court require that any fact, as distinct from a conviction, used to enhance a sentence be a fact found by a jury (unless of course the defendant waived a jury)?

Why didn't the Court just say that the fact must be found by a reliable means? Why in *Jones v. United States*, 526 U.S. 227, 249 (1999), decided the year before *Apprendi*, had the Court said that "one basis for that constitutional distinctiveness [of prior convictions] is [that] unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt *and jury trial* guarantees" (emphasis added)?

The Court in *Apprendi* did not take this back when it said that "if a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached." 530 U.S. at 484 (emphasis added). The defendant in this case was not "deprived of protections" that had attached to his juvenile-court proceeding. But that is not enough. The Court in *Apprendi*, unwilling to overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which permitted recidivist enhancements without requiring a trial in the new case to determine the defendant's guilt of an offense used to enhance his sentence, created a narrow exception to the requirement that facts that increase the statutory maximum sentence must be determined by a jury. The exception requires that the defendant's conviction of the prior offense have been established by a process in which he had had a right to a jury. The defendant in this case didn't have that right.

The constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement. So the mere fact that a juvenile had all the process he was entitled to doesn't make his juvenile conviction equivalent, for purposes of recidivist enhancements, to adult convictions.

Suppose a military commission convicted a suspected terrorist of a military crime, in a proceeding in which the defendant had not been entitled to all the rights he would have been entitled to in a conventional criminal proceeding, such as the right to a jury. Would it follow that because he had received all the rights to which military law entitled him, his conviction could be used to enhance a later conviction of a conventional crime? To answer in the affirmative would stretch *Apprendi* awfully far.

The Supreme Court's opinion in *McKeiver* had acknowledged that the juvenile courts are a mess, and subsequent research confirms that their noncriminal "convictions" may well lack the reliability of real convictions in criminal courts. Steven A. Drizin & Greg Luloff, "Are Juvenile Courts a Breeding Ground for Wrongful Convictions?" 34 N. Ky. L. Rev. 257 (2007); Barry C. Feld, "The Constitutional Tension Between *Apprendi* and *McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts," 38 Wake Forest L. Rev. 1111, 1161-77 (2003); Martin Guggenheim & Randy Hertz, "Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials," 33 Wake Forest L. Rev. 553, 564-82 (1998); Bluhm Legal Clinic, "Why Youth Contributes to Wrongful Convictions," http://cwcy.org/Why Youth Contributes.aspx (visited Apr. 8, 2010). We

learn from this literature that lawyers in juvenile courts are overloaded with cases, that they often fail to meet with their clients before entering a guilty plea and often rely on parents and on the child defendant himself to contact witnesses, and that they rarely file pretrial motions. And because the philosophy on which the juvenile court system was founded emphasizes protecting the "best interests of the child" and rehabilitating rather than punishing the child, the culture of the juvenile courts discourages zealous adversarial advocacy even though in its current form the juvenile justice system is much more punitive than its founders envisaged. Lawyers also appear to be reluctant to appeal juvenile cases and to seek postconviction relief; heavy caseloads, a prevalent view that appeals undermine the rehabilitation process, and an absence of awareness among juveniles of their appeal rights are the likely reasons for this reluctance.

Of particular relevance to *Apprendi*, the literature finds that judges are more likely to convict in juvenile cases than juries are. They are exposed to inadmissible evidence; they hear the same stories from defendants over and over again, leading them to treat defendants' testimony with skepticism; they become chummy with the police and apply a lower standard of scrutiny to the testimony of officers whom they have come to trust; and they make their decisions alone rather than as a group and so their decisions lack the benefits of group deliberation. It would be hasty to conclude that juvenile-court judges are more prone to convict the innocent than juries are. But if it is true that juvenile defendants fare worse before judges than they would before juries – if there is reason to think that trial by jury would alter the outcomes in a nontrivial proportion of juvenile

cases – one cannot fob off the *Apprendi* argument with the observation that a jury makes no difference.

Only the Supreme Court can decide authoritatively what its decisions mean. But the government's inability to give a reasoned basis for that position is telling, and the better view, I believe, is that a juvenile court "conviction" is not usable for enhancing a federal sentence.

As for the defendant's second supposed "violent felony" – "aggravated fleeing" – the other circuits are split over its proper classification. Compare *United States v. Wise*, 597 F.3d 1141, 1148 (10th Cir. 2010); *United States v. LaCasse*, 567 F.3d 763, 765-67 (6th Cir. 2009); *United States v. Harrimon*, 568 F.3d 531, 534-37 (5th Cir. 2009); *see also United States v. Hudson*, 577 F.3d 883 (8th Cir. 2009), holding that it is a violent felony, with *United States v. Harrison*, 558 F.3d 1280, 1290-96 (11th Cir. 2009), and *United States v. Tyler*, 580 F.3d 722, 724-26 (8th Cir. 2009), holding that it is not; see also *United States v. Rivers*, 595 F.3d 558, 564-65 (4th Cir. 2010). (*Tyler*, which did not cite *Hudson*, created a split within the Eighth Circuit.) *Wise*, *Hudson*, and *Tyler* are applications of section 4B1.2 of the federal sentencing guidelines rather than of the Armed Career Criminal Act, but "crime of violence" in the guidelines section is interpreted identically to "violent felony" in the Act. *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008).

Our court has lined up with the courts that deem "aggravated fleeing" a "violent felony" within the meaning of the Armed Career Criminal Act. *United States v. Sykes*, 598 F.3d 334, 335 (7th Cir. 2010); *United States v. Dismuke*, 593 F.3d 582, 590-96 (7th Cir. 2010); *United States v. Spells*, 537 F.3d 743, 747-

53 (7th Cir. 2008). These decisions are questionable in light of *Chambers v. United States*, ___ U.S. ___, 129 S. Ct. 687 (2009), where the Supreme Court held that the form of "escape" that consists merely of failing to report to prison on schedule to begin serving one's sentence is not a "violent felony." Neither is a walkaway escape. *See, e.g., United States v. Hart*, 578 F.3d 674, 680-81 (7th Cir. 2009); *United States v. Templeton*, *supra*, 543 F.3d at 383; *United States v. Lee*, 586 F.3d 859, 868-74 (11th Cir. 2009); *United States v. Hopkins*, 577 F.3d 507, 512-15 (3d Cir. 2009); *United States v. Charles*, 576 F.3d 1060, 1066-69 (10th Cir. 2009).

Typically the walkaway escapee begins his flight on foot but soon switches to a vehicle, while in aggravated fleeing a person disregards a signal or command from a police officer in a police car to pull over. Sometimes he flees at a dangerously high speed, but the offense in Illinois requires only that in the course of flight he disobey at least two "official traffic control devices." 625 ILCS 5/11-204.1(a)(4). That includes not only red lights and stop signs but also such less imperative traffic control devices as signs that say "slow down," "yield right of way," and "no right turn on red light between 7 a.m. and 7 p.m."

Aggravated fleeing is more dangerous on average than walkaway escapes or failures to report, but we know from *Begay v. United States*, *supra*, that dangerousness is not enough to render a crime a "violent felony." *Begay* involved driving under the influence of alcohol or drugs, and the Court held that such conduct is not a violent felony even though it is dangerous. Is aggravated fleeing more dangerous? When it takes the form of running a couple of stop signs,

perhaps late at night when there is no other traffic on the road, it may well be less dangerous than the average DUI case. Who knows? But in any event, *Begay* requires that the offense not only create a danger comparable to the dangers created by the offenses enumerated in the Armed Career Criminal Act (arson, burglary, extortion, and use of explosives to commit a crime) but also further resemble them in involving "purposeful, violent, and aggressive" conduct.

The test is difficult to apply. It is unclear what "aggressive" adds to "violent" (the Court didn't say), except in a case of defensive use of force, which ordinarily is not criminal at all, although it can be, as in a case in which a person is unreasonable in believing (though it is an honest belief) that he must use deadly force to defend himself. It is not even clear what "purposeful" adds to the definition of "violent felony" since even strict-liability crimes are "purposeful" in the sense that a deliberate act is involved. Sex with an underage girl is a crime even if the perpetrator thinks her of age, but the sexual act itself is deliberate.

Thus I don't agree that just because the defendant intended to flee from the police his action was "purposeful" within the meaning of the Supreme Court's formula. Given that the purpose of the catch-all provision in the Armed Career Criminal Act is to enable courts to identify crimes that are similar to the enumerated ones, "purposeful" should be interpreted to mean trying to harm a person's person or property, which is characteristic of the enumerated crimes. Burglary requires proof of intent to commit a crime following unlawful entry, arson proof of intent to destroy property without legal authority, extortion

proof of intent to obtain another person's property by a threat. These crimes do not merely create a *risk* of harm, as aggravated fleeing does.

It's not that the enumerated crimes necessarily are motivated by a desire to hurt anyone. The criminal may simply want the victim's property. (In an arson case, the victim is often an insurance company – and arsonists don't *dislike* insurance companies – rather the contrary!) But to get what he wants he has to harm the victim; purpose to harm is intrinsic to the crime although it often is not the motive. That is not true in a flight case any more than it is true in a DUI case. In both the perpetrator is behaving in a dangerous manner but in neither is he trying to take anything from anyone or otherwise harm anyone. And "although the [fleeing] statute does require intent, the required mental state is only intent to be free of custody, not intent to injure or threaten anyone. It is easy to violate [such a statute] without intending or accomplishing the destruction of property or acting in an aggressive, violence-provoking manner that could jeopardize guards or bystanders." *United States v. Templeton*, *supra*, 543 F.3d at 383.

Dismuke calls aggravated fleeing "aggressive" because it involves defiance of authority. 593 F.3d at 595. But that is true of all escapes – the point of *Chambers* was that we can't treat all escapes alike. *Dismuke* calls fleeing "active" rather than "passive," *id.*, but all actions are active, yet most are not aggressive. To fail to report to prison when ordered is to defy the authority of the sentencing judge and the Bureau of Prisons. Many acts of civil disobedience are emphatically active and defiant of authority at their core, but are miles away from being aggressive. *Dismuke* notes the possibility of a future confronta-

tion with authority but that is also a likely consequence of a walkaway escape or a failure to report and is an especially likely consequence of many acts of civil disobedience. Adopting a rule that would exclude from the category of "violent felony" a crime that while it may be dangerous does not involve any intention of harming anyone would go some distance toward clarifying the meaning of "violent felony" and by doing so perhaps check the avalanche of litigation over that meaning.

Echoing *Dismuke*, the majority opinion in the present case tries to distinguish fleeing from an officer from a walkaway escape or failure to report by describing each of the latter offenses as a "passive crime characterized by inaction," which might not be detected or provoke an immediate pursuit, in contrast to "vehicular fleeing [which] necessarily involves affirmative action on the part of the perpetrator" and "challenges the immediate authority of the police officer and calls on the officer to give immediate chase." But both a walkaway escape and a failure to report are challenges to authority; and while the failure to report does involve "inaction" rather than (affirmative) action, a walkaway escape does not. I don't understand what "immediate authority" means and I disagree that the fleer "call[s] on the officer to give immediate chase"; he would much prefer that the officer not give chase and doubtless in some cases the officer does not.

Only the Supreme Court can resolve the issues presented in this appeal. But pending the Court's intervention I am persuaded that the defendant's sentence is illegal.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, URBANA DIVISION

Devin WELCH, Petitioner,
v.
UNITED STATES of America, Respondent.

No. 08-CV-2051.

July 21, 2008.

OPINION

MICHAEL P. McCUSKEY, Chief Judge.

On February 25, 2008, Petitioner Devin Welch filed a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, along with a Memorandum of Law in Support (# 1). On April 3, 2008, the Government filed its Response (# 4), and on June 17, 2008, Petitioner filed a Reply (# 7). For the reasons that follow, Petitioner's motion is DENIED in part and GRANTED in part.

BACKGROUND

On September 8, 2005, Petitioner was indicted on a charge of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). On November 16, 2005, Petitioner pled guilty to the charge in the indictment. At sentencing, it was determined that Petitioner had four prior convictions that would qualify him as an Armed Career Criminal (ACC) un-

der the provisions of 18 U.S.C. § 924(e)(1). Petitioner had prior convictions for attempted armed robbery (committed as a juvenile), aggravated fleeing, and two aggravated batteries, one of which stemmed from an incident where Petitioner spit on a hospital employee. The court chose not to rely on the spitting conviction, holding that Petitioner still had the requisite three violent felony convictions necessary to qualify as an ACC. Petitioner was sentenced by this court to 180 months imprisonment, the statutory mandatory minimum sentence.

ANALYSIS

Petitioner asserts several interwoven claims. First, Petitioner argues that this court improperly dele-gated authority to the Probation office with regards to the number and range of drug-tests to which Petitioner is to be subject during supervised release, and that defense counsel was ineffective in failing to raise this issue at sentencing. Next Petitioner argues that two of his prior offenses should not have been considered when calculating his sentence as an ACC, and that counsel was ineffective in failing to challenge the characterization of those offenses. Finally, Petitioner contends that his appellate counsel was ineffective in failing to challenge on direct appeal the finding that he qualified as an ACC.

A § 2255 motion to vacate, set aside or correct a sentence is "neither a recapitulation of nor a substitute for a direct appeal." *Daniels v. United States*, 26 F.3d 706, 711 (7th Cir. 1994), *quoting Belford v. United States*, 975 F.2d 310, 313 (7th Cir. 1992). Constitutional errors not raised on direct appeal may not be raised in a § 2255 motion unless Petitioner can show cause for failing to raise the issue on ap-

peal and that Petitioner suffered prejudice as a result of the default, or else that "a fundamental miscarriage of justice" would result from failing to consider the claim. *McCleese v. United States*, 75 F.3d 1174, 1177 (7th Cir. 1996).

To establish ineffective assistance of counsel, Petitioner must demonstrate that his counsel's representation: (1) fell below an objective standard of reasonableness; and (2) that the attorney's deficient performance prejudiced the Petitioner. *McDowell v. Kingston*, 497 F.3d 757, 761 (7th Cir. 2007) *citing Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984). In evaluating counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689, *quoting Michel v. State of Louisiana*, 350 U.S. 91, 101 (1955). To establish the prejudice prong, Petitioner must show that there is a reasonable likelihood that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687. Petitioner's claim fails if he fails to establish either the reasonableness or prejudice prong of the *Strickland* test.

Petitioner asserts that drug-testing requirements that were a condition of his release were improperly delegated to the probation office. The government concedes that, according to the Seventh Circuit's holding in *United States v. Bonanno*, 146 F.3d 502, 511 (7th Cir. 1998), the responsibility for determining the number or range of drug tests to which a defendant must submit falls to the district court and

cannot be delegated to the probation office. The Government accordingly recommends, and this court agrees, that the proper remedy is to strike the word "testing" in the second sentence of Special Conditions of Supervision # 2 and replace it with "not more than six tests per month." This amendment clarifies that the Court has specifically ordered the range of drug tests to which the Petitioner must submit, and renders Petitioner's drug-testing requirements identical to the language that the Probation office now recommends in all cases involving drug-testing as a condition of supervised release. Petitioner's motion is granted, to the extent that his sentence, in this regard only, is vacated and an amended special condition is imposed that corrects for the improper delegation of authority to the probation office.

Petitioner next contends that he was improperly classified as an ACC, and that his lawyer was ineffective in failing to challenge this classification at sentencing. To qualify as an ACC pursuant to 18 U.S.C. § 924(e)(1) (ACCA), a defendant must possess three prior convictions for a violent felony or a serious drug offense. Because Petitioner was determined at sentencing to have three prior qualifying offenses, he was sentenced as an ACC. At his sentencing hearing Petitioner objected, pro se, to the characterization of several of his prior convictions as predicate offenses under the ACCA, but the issue was not raised on direct appeal. Petitioner now challenges two of those three determinations.

At sentencing, the court determined that Petitioner's juvenile conviction for attempted armed robbery did qualify as a violent felony. Relying heavily on the Ninth Circuit's decision in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), Petitioner con-

tends that this conviction should not qualify him for classification as an ACC since it did not result from a jury trial, and that his lawyer was ineffective in failing to raise this claim at sentencing. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory minimum must be submitted to a jury, and proved beyond a reasonable doubt." In *Tighe*, the Ninth Circuit held that the prior conviction exception in *Apprendi* did not cover juvenile adjudications, asserting that "the fundamental triumvirate of procedural protections," namely fair notice, reasonable doubt, and a jury trial, must be in place before an adjudication can qualify for an *Apprendi* exception. *Tighe*, 266 F.3d at 1193-1194.

Since *Tighe*, every other Court of Appeals to consider the issue has rejected the Ninth Circuit's reasoning and concluded that juvenile adjudications can count as predicate offenses for ACCA purposes. *See United States v. Matthews*, 498 F.3d 25, 34-36 (1st Cir. 2007); *United States v. Crowell*, 493 F.3d 744, 750-751 (6th Cir. 2007); *United States v. Burge*, 407 F.3d 1183, 1190-91 (11th Cir. 2005); *United States v. Jones*, 332 F.3d 688, 696 (3rd Cir. 2003); *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002). Noting that there is no constitutional right to a jury trial in a juvenile court's adjudicative stage, the Third Circuit held that, "[a] prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes." *Jones*, 332 F.3d at 696.

The Seventh Circuit has yet to make a determination on this issue, and this court does not feel that

it is necessary to do so here. Unlike the cases cited from other circuits, this is not a direct appeal, but a motion to vacate a sentence under § 2255, in which Petitioner's principal claim is ineffective assistance of counsel.[1] An assessment of counsel's performance must rest on the state of the law when Petitioner was sentenced. *See Hardamon v. United States*, 319 F.3d 943, 948 (7th Cir. 2003). The Government is correct in asserting that, at the time of Petitioner's August 2006 sentencing, three circuits had already rejected the holding of *Tighe*, and reaffirmed the prior conviction exception to *Apprendi* for juvenile offenses. Thus, it was not outside the range of reasonable professional behavior for Petitioner's counsel to choose not to challenge the characterization of Petitioner's juvenile conviction in light of the fact that the Ninth Circuit stood, and still stands, alone among the circuits in refusing to recognize such crimes as predicate offenses.

In addition, Petitioner cannot show prejudice based on counsel's failure to challenge the status of his juvenile conviction at sentencing, since Petitioner himself raised these concerns, and they were fully heard by the court. The record shows that the court specifically indicated to Petitioner that, while the issue was not resolved in his favor, he had successfully preserved the issue of the constitutionality of his sentence, including the status of his prior juvenile offense, for challenge on appeal. Petitioner's claim of ineffective assistance of counsel on this point thus

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[1] Petitioner's has procedurally defaulted a consideration of the claim on the merits, having failed to raise the issue on direct appeal. Petitioner counters that he has cause for his failure to raise the issue on appeal, namely the ineffective assistance of his appellate counsel. This court rejects that claim, however.

fails both the prejudice and the reasonableness prong of the Strickland standard.

Petitioner also challenges the determination that his Cook County conviction for aggravated fleeing/eluding a police officer qualified as a violent felony for ACC purposes. In contrast to Petitioner's characterization of this type of charge as merely a serious traffic offense, the Seventh Circuit held in *United States v. Howze*, 343 F.3d 919, 921 (7th Cir2003) that flights to avoid arrest are categorically crimes of violence because they involve serious potential risk of injury to another. Noting that flight to avoid apprehension may in fact present more risk of violence than escape attempts, which are regarded as violent crimes for ACCA purposes, the Seventh Circuit reasoned, "[b]ystanders are in particular jeopardy. Collisions between fleeing vehicles and pedestrians or others who get in the way are common." *Howze*, 343 F.3d at 921. Thus, although Petitioner is correct that the Seventh Circuit has not specifically determined that the crime as defined in Illinois law qualifies as a violent felony for ACC purposes, the categorical language of the holding in *Howze*, and the similarity between the Wisconsin statue at issue in that case and the Illinois statue under which Petitioner was charged, lead to a determination that this court was indeed correct in interpreting Petitioner's aggravated fleeing offense as a violent felony.[2]

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[2] Petitioner also appears to have procedurally defaulted this claim by not raising it in his direct appeal. This court agrees with the government that, whether this issue is considered on the merits, or is construed as a claim of ineffective assistance of counsel, Petitioner's claim fails.

With regards to Petitioner's claim of ineffective assistance of counsel, at the time of Petitioner's sentencing there was very little in the case law to suggest that an objection to the categorization of the aggravated fleeing charge as a violent felony was likely to succeed, given the holding in *Howze*, Thus, it was not unreasonable for Petitioner's defense counsel to choose not to raise this issue at Petitioner's sentencing hearing. Moreover, Petitioner cannot demonstrate the necessary prejudice based on counsel's failure to challenge the categorization of the fleeing offense as violent felony, since Petitioner himself raised this issue, and the sentencing court rejected it. Because he cannot demonstrate prejudice, Petitioner's claim of ineffective assistance of counsel fails.

Petitioner finally asserts that his appellate counsel was ineffective in failing to challenge the sentencing court's determination that his prior offenses qualified him as an ACC. In a related claim, Petitioner argues that appellate's counsel's ineffective assistance provides the necessary cause to bar a procedural default of those claims. Even if Petitioner can demonstrate cause for the procedural default, however, he cannot demonstrate prejudice. Admittedly there is no controlling authority directly addressing the question of whether juvenile offenses in nonjury adjudications count as violent felonies under the ACCA, nor has the Seventh Circuit, to date, ruled that flight to avoid apprehension, under the Illinois statue, should qualify. However, the case law that does exist leans heavily towards the conclusion that this court was correct in finding that both offenses did qualify Petitioner for an enhanced sentence under the ACCA. The case law is clear that an attorney's failure to anticipate changes in existing

law does not rise to the level of constitutional ineffectiveness. *See Lily v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993) (holding that the Sixth Amendment does not require counsel to forecast changes or advances in the law). Because Petitioner has not demonstrated that a constitutional challenge to the district court's characterization of his prior offenses as violent felonies was likely to succeed, he has not shown that he was prejudiced by his appellate counsel's failure to raise the issue on appeal. Because there was no prejudice, his claim of ineffective assistance of counsel fails. Likewise, Petitioner's constitutional challenge to the characterization of his prior offenses is procedurally defaulted because Petitioner has not demonstrated that he suffered prejudice as a result of the default, nor has he shown that failing to consider these issue on the merits would lead to a fundamental miscarriage of justice.

IT IS THEREFORE ORDERED:

(1) Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (# 1) is DENIED in part and GRANTED in part.

(2) Petitioner's Motion (# 1) is granted solely to the extent that his sentence is vacated regarding the improper delegation to the probation office of the drug-testing requirements that were a condition of his release. Accordingly, this court orders that the judgment entered in Case NO. 05-CR-20038 is corrected so that the word "testing" in the second sentence of Special Conditions of Supervision # 2 is replaced with "not more than six tests per month." Petitioner's (# 1) motion is denied in all other respects.

(3) This case is terminated.

Supreme Court, U.S.
FILED
NOV 3 - 2010
OFFICE OF THE CLERK

No. 10-314

In the Supreme Court of the United States

DEVIN WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether defense counsel was ineffective for not arguing that the district court violated the Sixth Amendment by imposing an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), based in part on a prior juvenile adjudication in which petitioner had no right to a jury trial.

2. Whether a prior felony conviction under Illinois law for aggravated vehicular flight from a law enforcement officer qualified as a "violent felony" under the ACCA.

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In the Supreme Court of the United States

No. 10-314

DEVIN WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 604 F.3d 408. The opinion of the district court (Pet. App. 53a-61a) is not published in the *Federal Supplement* but is available at 2008 WL 2796953.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2010. On July 26, 2010, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including September 1, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the Central District of Illinois, petitioner was

convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to the mandatory minimum 15 years of imprisonment. The court of appeals affirmed. Petitioner subsequently filed a motion under 28 U.S.C. 2255 (Supp. II 2008) seeking to vacate his ACCA sentence. The district court denied the motion. The court of appeals affirmed.

1. In 2005, petitioner pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2a. A violation of Section 922(g) is ordinarily punishable by imprisonment for "not more than 10 years." 18 U.S.C. 924(a)(2). The ACCA provides, however, that a defendant who commits a violation of Section 922(g) is subject to a mandatory minimum sentence of 15 years of imprisonment if the defendant has three prior convictions for "a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1).

The Act defines a "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The ACCA also provides that "the term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony." 18 U.S.C. 924(e)(2)(C).

Petitioner's Presentence Investigation Report (PSR) indicated that petitioner had four prior convictions that were "violent felonies" for purposes of the ACCA: two aggravated batteries, aggravated fleeing or attempting to elude a police officer, and a juvenile adjudication for attempted armed robbery. Pet. App. 2a; PSR ¶ 22.

At sentencing, petitioner's counsel made no objections to the PSR, but petitioner submitted a handwritten objection to the use of the previous convictions to enhance his sentence. The district court overruled that objection and sentenced petitioner to 15 years of imprisonment, to be followed by a five-year term of supervised release. Pet. App. 2a.[1]

On direct appeal, petitioner, through counsel, did not pursue his pro se objection to the use of his prior convictions for ACCA enhancement. He contended only that the trial court had erred in failing to specify the number of required drug tests during the period of supervised release. Pet. App. 3a. The court of appeals summarily affirmed the judgment of conviction and sentence. *United States* v. *Welch*, No. 06-3385 (7th Cir. Feb. 21, 2007).

2. Petitioner subsequently filed a pro se motion under 28 U.S.C. 2255 (Supp. II 2008) seeking to set aside his sentence. He contended that his conviction for aggravated fleeing or attempting to elude a police officer was not a violent felony for purposes of ACCA. He also

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[1] The district court did not rely on one of the aggravated battery convictions, which was for spitting. Pet. App. 2a.

contended that his counsel had been ineffective in failing to contend that the Sixth Amendment prohibited the district court's use of petitioner's juvenile adjudication to enhance petitioner's sentence under ACCA because petitioner had no right to a jury trial in that juvenile proceeding. Pet. App. 3a.

The district court denied the motion in relevant part. In rejecting petitioner's ACCA claim, it relied on Seventh Circuit precedent holding that flight to avoid arrest categorically created a serious potential risk of injury to another and thus was a violent felony. In rejecting petitioner's ineffective-assistance claim, the district court noted that, at the time of sentencing, the circuits were divided three-one against petitioner's position, with the Seventh Circuit silent. The court thus concluded that it was a reasonable tactical choice for counsel not to raise the issue. Pet. App. 3a-4a, 56a-61a.

3. The court of appeals initially granted a certificate of appealability only on the issue of ineffective assistance but subsequently expanded the certificate to include the issue of whether petitioner's conviction for aggravated fleeing or attempting to elude a police officer properly was classified as a violent felony. Pet. App. 4a. The court of appeals affirmed the district court's denial of petitioner's Section 2255 motion.

a. The court of appeals first accepted that a challenge to the application of the ACCA to sentence a defendant above the otherwise-applicable ten-year maximum was cognizable on collateral review and that retroactive application would be given to this Court's recent decisions in *Begay* v. *United States*, 553 U.S. 137 (2008), and *Chambers* v. *United States*, 129 S. Ct. 687 (2009). Pet. App. 4a-11a. These determinations are not at issue here.

The court of appeals then determined that the Illinois offense of aggravated fleeing or attempting to elude a police officer was a violent felony under the ACCA.[2] The court interpreted the Illinois statute as requiring a mens rea of intentional, purposeful conduct, although the statute did not explicitly provide for a mens rea. Pet. App. 17a-24a. The court then held that any such purposeful vehicular flight from a police officer's direction to stop was a violent felony. *Id.* at 24a-32a. It reasoned that although any such vehicular flight qualifies as a violent felony, the subcategories of the statutory offense (see note 2, *supra*) were designed to exclude from coverage those violations that did not involve at least one aggravating factor of high speed, significant injury or property damage, or disobedience of multiple traffic control devices such as traffic lights or stop signs. Pet. App. 27a-28a.

b. The court of appeals also rejected petitioner's contention that his counsel was ineffective for failing to

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[2] The Illinois statute under which petitioner was convicted provides:

> The offense of aggravated fleeing or attempting to elude a peace officer is committed by any driver or operator of a motor vehicle who flees or attempts to elude a peace officer, after being given a visual or audible signal by a peace officer in the manner prescribed in subsection (a) of Section 11-204 of this Code, and such flight or attempt to elude:
>
> (1) is at a rate of speed at least 21 miles per hour over the legal speed limit;
>
> (2) causes bodily injury to any individual;
>
> (3) causes damage in excess of $300 to property; or
>
> (4) involves disobedience of 2 or more official traffic control devices.

625 Ill. Comp. Stat. Ann. 5/11-204.1(a) (West Supp. 2010).

challenge the inclusion of petitioner's juvenile conviction as an ACCA predicate offense. Pet. App. 32a-40a. The court did not determine whether it was a reasonable tactical choice—and therefore not ineffective assistance—for counsel to elect not to raise an issue on which there was a circuit conflict, but no controlling Seventh Circuit precedent. Instead, the court ruled that petitioner was not prejudiced because such juvenile convictions are properly counted for purposes of imposing a sentence under the ACCA. Agreeing with decisions from the Third, Fourth, Sixth, Eighth, and Eleventh Circuits, the court of appeals concluded that "the protections juvenile defendants receive—notice, counsel, confrontation and proof beyond a reasonable doubt—ensure that the proceedings are reliable" and eliminate any Sixth Amendment problem with using such adjudications as a basis for a later sentence enhancement. Pet. App. 40a; see *id.* at 35a (discussing Ninth Circuit's contrary view).

In dissent, Judge Posner disagreed with the majority's decisions that the Illinois aggravated fleeing offense is a violent felony and that a juvenile conviction may be used as an ACCA predicate. Pet. App. 41a-52a.

DISCUSSION

Petitioner renews (Pet. 9-21) his argument that the Sixth Amendment barred the enhancement of his sentence under the ACCA based on his prior juvenile adjudication (and that his defense counsel was ineffective for not making the contention at the time of sentencing). Petitioner's argument lacks merit. There is a lopsided conflict in the lower courts on the question whether the fact of a prior juvenile adjudication may be found by a judge at sentencing as a predicate to enhancing a sen-

tence, but this Court has repeatedly declined review on that question, including on November 1, 2010. There has been no intervening change in circumstances that warrants a different result here. Petitioner also appears to assert a distinct and broader claim, *i.e.*, that the Sixth Amendment forbids all use of juvenile adjudications to which no jury trial right attached to trigger an increase in the maximum penalty for a subsequent offense. There is no circuit conflict on that contention, which lacks merit in any event.

Petitioner also asserts (Pet. 21-31) that the Illinois aggravated vehicular flight offense does not qualify as a violent felony under the ACCA. The question whether a prior felony conviction under Indiana law for intentional vehicular flight from a law enforcement officer is a violent felony for ACCA purposes is currently before the Court in *Sykes* v. *United States*, cert. granted, No. 09-11311 (Sept. 28, 2010). This Court's decision in *Sykes* would likely be relevant to whether petitioner's Illinois aggravated vehicular flight offense qualifies as a violent felony. Accordingly, the Court should hold this petition pending its decision in *Sykes* and then dispose of it as appropriate in light of that decision.

1. a. In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that, "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490 (emphasis added). As the emphasized language indicates, the Court in *Apprendi* left intact its prior holding in *Almendarez- Torres* v. *United States*, 523 U.S. 224 (1998), that the fact of a defendant's prior conviction may be treated as a sentencing factor to be found by the court—rather than an of-

fense element to be found by the jury—even where that finding results in a sentence greater than the statutory maximum that would otherwise apply. See *id.* at 239-247. The Court has since reaffirmed that rule on numerous occasions. See *Cunningham* v. *California*, 549 U.S. 270, 274-275 (2007); *Shepard* v. *United States*, 544 U.S. 13, 24 (2005) (plurality opinion); *United States* v. *Booker*, 543 U.S. 220, 244 (2005); *Blakely* v. *Washington*, 542 U.S. 296, 301 (2004); *Dretke* v. *Haley*, 541 U.S. 386, 395 (2004).

A sentencing judge's use of non-jury juvenile adjudications to enhance an adult sentence does not implicate *Apprendi*'s core concerns. It does not lead to "encroachment * * * by the judge upon facts historically found by the jury." *Oregon* v. *Ice*, 129 S. Ct. 711, 718 (2009). Like the fact of a prior adult conviction, the fact that a defendant has a prior juvenile adjudication involves recidivism—"a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Apprendi*, 530 U.S. at 488 (quoting *Almendarez-Torres*, 523 U.S. at 243).

Petitioner does not contest the Court's holding in *Almendarez-Torres* insofar as it applies to prior adult convictions. See Pet. 10 n.4. He contends, however, that because he was not entitled to trial by jury in the prior juvenile adjudication relied upon by the district court in his underlying criminal case, the use of that adjudication to enhance his sentence under the ACCA violated his Sixth Amendment right to a jury trial. See, *e.g.*, Pet. 16. In support of this contention, petitioner argues that the district court's reliance on the juvenile adjudication was inappropriate because there was no jury in that proceeding to guard against "government oppression," Pet. 19,

and because juries are better at fact-finding than judges, Pet. 20.

Petitioners' arguments about the process employed during juvenile adjudications have no logical connection to the question whether the rule of *Apprendi*—rather than the prior conviction exception to that rule—should apply to the fact of a juvenile conviction. The *Apprendi* rule is concerned with whether certain "fact[s]" used to increase a defendant's maximum punishment must be charged in an indictment and decided by a jury beyond a reasonable doubt. See 530 U.S. at 490. Contrary to petitioner's implicit suggestion, the rule of *Apprendi* does not embody any substantive limitations on what facts may be used to increase maximum punishment. Instead, it addresses the question of who decides those facts—judge or jury—and by what standard.

If petitioner were correct that the prior conviction exception to *Apprendi* did not apply to the fact of prior juvenile convictions, that would mean only that the fact of such convictions would have to be found by the jury beyond a reasonable doubt. See *People* v. *Nguyen*, 209 P.3d 946, 950-951 (Cal. 2009) ("The statutorily relevant sentencing 'fact' in this case is whether defendant's record includes a prior adjudication of criminal conduct * * * as a basis for enhancing his current sentence. Aside from any exception that might apply here, the literal *rule* of *Apprendi* thus required only that a jury in the current proceeding determine the existence of such an alleged prior adjudication."), cert. denied, 130 S. Ct. 2091 (2010); accord *State* v. *McFee*, 721 N.W.2d 607, 617-618 (Minn. 2006) ("[T]he role for a jury would be extremely limited in this context. * * * [T]he jury would simply verify the fact of the existence of the juvenile court adjudication, and the fact of the adjudication

would be proven (or disproven) through use of documentary evidence of the adjudication."). Application of *Apprendi* to juvenile adjudications would not mean that such adjudications could not be considered at all, or that the facts underlying them would have to be retried in the subsequent case. Accordingly, petitioner's efforts to impeach the reliability of juvenile adjudications based on the lack of a jury trial right are beside the point; even if petitioner's understanding of *Apprendi* were correct, the fact of those convictions could still be used—by the jury in the subsequent case—to increase a defendant's maximum punishment.

As petitioner notes (Pet. 10-15), there is a lopsided conflict among the courts of appeals and state high courts on the question whether prior juvenile adjudications in which the defendant had no right to a jury determination fall within the prior conviction exception to the *Apprendi* rule and thus may be used by a sentencing judge to enhance a statutory penalty. In *United States* v. *Smalley*, 294 F.3d 1030 (2002), cert. denied, 537 U.S. 1114 (2003), the Eighth Circuit held that "juvenile adjudications can rightly be characterized as 'prior convictions' for *Apprendi* purposes." *Id.* at 1033. In addition to the court below, the Third, Fourth, Sixth, and Eleventh Circuits have reached the same conclusion. See *United States* v. *Jones*, 332 F.3d 688, 696 (3d Cir. 2003), cert. denied, 540 U.S. 1150 (2004); *United States* v. *Wright*, 594 F.3d 259 (4th Cir. 2010), cert. denied, No. 10-5645 (Nov. 1, 2010); *United States* v. *Crowell*, 493 F.3d 744, 750 (6th Cir. 2007), cert. denied, 552 U.S. 1105

(2008); *United States* v. *Burge*, 407 F.3d 1183, 1190-1191 (11th Cir.), cert. denied, 546 U.S. 981 (2005).[3]

The Ninth Circuit, however, has held that

> the "prior conviction" exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi*'s "prior conviction" exception.

United States v. *Tighe*, 266 F.3d 1187, 1194 (2001).[4] In reaching this conclusion, the Ninth Circuit made the same error as petitioner. It found the prior-conviction exception to *Apprendi* inapplicable because the defendant before it did not have the right to a jury in his prior juvenile adjudications, see *id.* at 1194-1195, but failed to explain why that concern with the prior adjudication would be ameliorated by having the jury in the subsequent case (rather than the judge) find that the defendant had in fact been previously convicted.

This Court has repeatedly denied petitions for certiorari presenting the question whether prior juvenile adjudications fall within the prior conviction exception to

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[3] A number of state supreme courts have reached the same conclusion. See *State* v. *Weber*, 149 P.3d 646, 649-653 (Wash. 2006), cert. denied, 551 U.S. 1137 (2007); *McFee*, 721 N.W.2d at 616-619; *Ryle* v. *State*, 842 N.E.2d 320, 321-323 (Ind. 2005), cert. denied, 549 U.S. 836 (2006); *State* v. *Hitt*, 42 P.3d 732, 740 (Kan. 2002), cert. denied, 537 U.S. 1104 (2003).

[4] Two state supreme courts have reached the same conclusion. See *State* v. *Harris*, 118 P.3d 236, 246 (Or. 2005); *State* v. *Brown*, 879 So. 2d 1276, 1290 (La. 2004), cert. denied, 543 U.S. 1177 (2005).

the *Apprendi* rule, including on November 1, 2010. See, *e.g.*, *Wright* v. *United States*, No. 10-5645 (Nov. 1, 2010); *McCray* v. *United States*, 129 S. Ct. 570 (2008) (No. 08-5701); *Crowell* v. *United States*, 552 U.S. 1105 (2008) (No. 07-6742); *Sasouvong* v. *Washington*, 552 U.S. 816 (2007) (No. 06-1543); *Kirkland* v. *United States*, 549 U.S. 968 (2006) (No. 06-6307); *Burge* v. *United States*, 546 U.S. 981 (2005) (No. 05-5601); *Robinson* v. *United States*, 543 U.S. 890 (2004) (No. 04-5266); *Jones* v. *United States*, 540 U.S. 1150 (2004) (No. 03-6784); *Smalley* v. *United States*, 537 U.S. 1114 (2003) (No. 02-6693); see also *Nguyen*, 209 P.3d at 954 & n.10 (collecting additional examples). There has been no material change in circumstances since these denials of certiorari.

b. Petitioner appears to also be making a distinct and much broader claim, *i.e.*, that the Sixth Amendment precludes all use (whether by judge or jury) of the fact of a non-jury juvenile adjudication to increase maximum punishment in a subsequent case. Petitioner's contention that juvenile adjudications are not sufficiently "reliable" to provide a basis for subsequent increased punishment for recidivism, see Pet. 19-21, suggests that his view may be that "the state must prove to a jury [in the adult case] that the defendant actually committed the crime alleged in the juvenile adjudication to use it as a basis for sentence enhancement." Pet. 14. This contention lacks merit, and there is no conflict in the lower courts on it.

As noted above, the claim that a juvenile conviction secured without right to a jury trial can never provide the basis for a subsequent increase in punishment for recidivism finds no support in the holding of *Apprendi* or related cases, all of which involve not substantive pro-

hibitions on use of facts to increase punishment but instead the allocation of authority for finding those facts. See p. 9, *supra*. Petitioner nonetheless construes language in *Apprendi* and *Jones* v. *United States*, 526 U.S. 227 (1999), as supporting his view that his punishment could not be increased based on an adjudication during which he had no right to a jury trial. See Pet. 16-17; see also *Jones*, 526 U.S. at 249 ("One basis" for prior-conviction exception is that "unlike virtually any other consideration used to enlarge the possible penalty for an offense * * * a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."); *Apprendi*, 530 U.S. at 496 ("[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.").

Neither *Apprendi* nor *Jones* involved increased punishment for recidivism, so the language on which petitioner relies is dicta. See *Nguyen*, 209 P.3d at 956. Moreover, as the Eighth Circuit has noted, *Apprendi* "established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof)," but "the Court did not take a position on possibilities that lie in between these two poles." *Smalley*, 294 F.3d at 1032; see *Nguyen*, 209 P.3d at 956 (neither *Jones* nor *Apprendi* "state[d] that each and every one of these guarantees, or any one of them in particular, is essential to the availability of a prior criminal adjudication to furnish * * *

proof" "of previous criminal misconduct"). Instead, the cited language in those cases is best read to mean that "a constitutionally reliable prior adjudication of criminality, obtained pursuant to *all procedural guarantees constitutionally due to the offender in the prior proceeding*—specifically including the right to proof beyond a reasonable doubt" may be among the "facts" that can "influence the maximum permissible sentence." *Ibid.* (emphasis in original); see *Wright*, 594 F.3d at 264-265; Pet. App. 39a-40a.

Petitioner makes no claim that he was not afforded all the constitutional guarantees he was due in his juvenile adjudication. That adjudication thus provided an appropriate basis for a finding of recidivism. "[I]t [would] make[] little sense to conclude * * * that a judgment of juvenile criminality which the Constitution deemed fair and reliable enough, when rendered, to justify confinement of the minor in a correctional institution is nonetheless constitutionally inadequate for later use to establish the same individual's recidivism as the basis for an enhanced adult sentence." *Nguyen*, 209 P.3d at 955; see *Wright*, 594 F.3d at 263-264 ("As a jury is not required in a juvenile adjudication on the merits, we see no reason to impose such a requirement through the back door.").

There is no conflict in the circuit courts or state supreme courts on petitioner's broad Sixth Amendment claim. The decisions that petitioner claims are on his side of a split decided only the distinct, narrower question addressed above, namely whether the fact of a prior juvenile adjudication secured without a jury trial guarantee may be found by a sentencing judge, or must instead be found by a jury.

In *Tighe*, the defendant's argument was that "*Apprendi* requires that the fact of his juvenile adjudication be charged in an indictment and found by a jury beyond a reasonable doubt." 266 F.3d at 1191. The court of appeals agreed, concluding that defendants' "prior juvenile adjudications" had to be "presented to the jury" (or be the subject of a stipulation). *Id.* at 1194 n.5. Likewise, the Louisiana Supreme Court in *Brown* held only that juvenile adjudications without a jury trial right fell outside "*Apprendi*'s narrow exception, which exempts only 'prior convictions' from its general rule that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *State* v. *Brown*, 879 So. 2d 1276, 1290 (La. 2004), cert. denied, 543 U.S. 1177 (2005). Finally, the Oregon Supreme Court, which held that the fact of prior juvenile adjudications had to be found by a jury before they could be used to increase maximum punishment in a subsequent case, made clear that there was no Sixth Amendment requirement that "the facts giving rise to those adjudications [be] presented to a jury and relitigated." *State* v. *Harris*, 118 P.3d 236, 243 (Or. 2005); see *ibid.* ("[T]he legislature [may] choose[] to designate, *inter alia*, a prior nonjury juvenile adjudication as an element that increases the seriousness of a crime or lengthens a criminal sentence."). A number of the petitions for writs of certiorari in this area raised this broad claim as well, see, *e.g.*, *Wright*, No. 10-5645; *McCray*, 129 S. Ct. 570; *Crowell*, 552 U.S. 1105; *Sasouvong*, 552 U.S. 816; *Burge*, 546 U.S. 981, and, as noted, the Court has denied all of them. See pp. 11-12, *supra*.

c. In all events, this petition is a poor vehicle for reviewing petitioner's Sixth Amendment claim.

First, the question comes to the Court in an unusual posture, as part of an ineffective assistance of counsel claim asserted in a petition for collateral relief. See Pet. App. 58a ("Unlike the cases cited from other circuits, this is not a direct appeal, but a motion to vacate a sentence under [Section] 2255, in which [p]etitioner's principal claim is ineffective assistance of counsel."); Pet. C.A. Br. 2 (issue presented was "[w]hether [p]etitioner was denied his constitutional right to effective assistance of counsel when his trial and appellate counsel failed to raise an *Apprendi* objection to the use of his nonjury juvenile adjudication for sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. [] 924(e)").

Accordingly, even if petitioner were to prevail on his *Apprendi* claim, he would not be entitled to Section 2255 relief from his sentence unless he could show, among other things, that counsel's failure to raise this claim "was below an objective standard of reasonableness." Pet. App. 32a (citing *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984)). The district court denied his Section 2255 motion on that basis, holding that "it was not outside the range of reasonable professional behavior for [p]etitioner's counsel to choose not to challenge the characterization of [p]etitioner's juvenile conviction" in light of the fact that the weight of authority at the time of petitioner's sentencing would have rejected this claim. *Id.* at 58a. The court of appeals reserved judgment on that question, *id.* at 32a, but could affirm the district court on that ground even if its substantive Sixth Amendment holding were reversed.

Second, petitioner's juvenile adjudication was the result of a guilty plea, see PSR ¶ 24, not a bench trial he was compelled to undergo in the absence of a jury trial right. He does not contend that he pleaded guilty in that

juvenile proceeding only because he could not be tried by a jury; nor does he contend that the plea was not knowing and voluntary. The fact that the adjudication that provided the basis for petitioner's sentence enhancement was the result of his own decision to plead guilty, rather than a jury-free trial process, undermines his Sixth Amendment claim regarding that adjudication.

Third, petitioner has not challenged the fact of his juvenile adjudication. He thus fails to explain why having a jury, rather than the sentencing judge, determine whether he was in fact convicted would have made any difference in this case. See *James* v. *United States*, 550 U.S. 192, 214 n.8 (2007) (finding claim that "the simple fact of [defendant's] prior conviction was required to be found by a jury" to be "baseless" in light of the fact that defendant had "admitted the fact of his prior conviction"); *Apprendi*, 530 U.S. at 488 ("[T]he reality that Almendarez-Torres did not challenge the accuracy of [the] 'fact' [of prior conviction] in his case * * * mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range.").

2. As noted above, disposition of petitioner's second question could be affected by this Court's decision in *Sykes*, *supra*. Accordingly, the Court should hold this petition pending its decision in *Sykes* and then dispose of it as appropriate in light of that decision.[5]

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[5] In the event *Sykes* were decided in a way that cast doubt on the court of appeals' disposition of petitioner's ACCA claim, the proper course would be to grant the petition, vacate the decision below, and remand for further proceedings in light of *Sykes*. There would be no basis at that point for review of petitioner's ineffective assistance of counsel claim. If post-remand proceedings resulted in a conclusion that

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Sykes* and then disposed of as may be appropriate.

Respectfully submitted.

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NOVEMBER 2010

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petitioner's conviction for aggravated fleeing/eluding an officer was not properly deemed an ACCA predicate, then petitioner would have only two ACCA-eligible prior convictions, even counting his juvenile adjudication, and would not be eligible for an ACCA sentence.

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175 (4)

No. 10-314

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DEVIN WELCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

With respect to petitioner's first issue, the scope of the "prior conviction" exception in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the government does not dispute the importance of the question presented, and it concedes that the federal courts of appeals and state courts of last resort are openly divided over the issue. The government offers no valid reason why this Court should deny certiorari. To the contrary, its opposition underscores the pervasive confusion over the issue, which is reflected in the different approaches taken by the lower courts.

As the government points out, petitioner's second issue—whether vehicular flight from a police officer constitutes a "violent felony" under the Armed Career Criminal Act (ACCA)—is currently before the Court in *Sykes v. United States*, No. 09-11311 (cert. granted Sept. 28, 2010). Petitioner agrees that this Court's decision in *Sykes* may affect the disposition of his ACCA claim. However, because the *Apprendi* issue warrants review and is not addressed by *Sykes*, the petition should be granted.

I. The Lower Courts Are Divided Over The Scope Of *Apprendi*'s "Prior Conviction" Exception

As the petition demonstrates, the Seventh Circuit's holding that *Apprendi*'s "prior conviction" exception applies to nonjury juvenile adjudications conflicts both with the rulings of other courts and with this Court's Sixth Amendment precedents. The government concedes (at 10-11) that the lower courts are divided over the issue. Indeed, the government has previously urged this Court to grant review on this issue "[i]n light of the square circuit conflict, which

involves a question of recurring importance." See Brief for the United States 11, *Smalley v. United States*, No. 02-6693 (Dec. 13, 2002); Amicus Brief for the United States 8, *Hitt v. Kansas*, No. 01-10864 (Dec. 13, 2002).

The government now retreats from its previous recommendation for review and attempts to downplay the significance of the split among the courts. The government states that "[t]he decisions that petitioner claims are on his side of a split decided only the distinct, narrower question . . . whether the fact of a prior juvenile adjudication secured without a jury trial guarantee may be found by a sentencing judge, or must instead be found by a jury." Opp. 14. The government further argues that none of the circuit courts or state supreme courts hold that nonjury juvenile adjudications "could not be considered at all, or that the facts underlying them would have to be retried in the subsequent case." *Id.* at 10, 15.

But that is precisely what the Louisiana Supreme Court held. "[W]e find because juveniles do not have a right to a jury trial in these proceedings, juvenile adjudications cannot be used to enhance adult felony convictions." *State v. Brown*, 879 So. 2d 1276, 1288 (La. 2004). In holding that nonjury juvenile adjudications fall outside *Apprendi*'s "prior conviction" exception, the *Brown* court did not suggest that the constitutional violation would be cured merely by proving the existence of the prior juvenile adjudication to a jury in the subsequent case, as the government contends. Rather, the court held that any use of such adjudications is impermissible because "[i]t would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer."

Id. at 1289. As the court observed, "[i]t seems contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use adjudications obtained for treatment purposes to punish them more severely as adults." *Ibid.* Submitting only the "fact" of a defendant's juvenile adjudication to a jury in the adult case would do nothing to relieve this concern.

The Ninth Circuit did not explicitly state the reach of its Sixth Amendment ruling in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), but *Tighe* and later Ninth Circuit precedent are at odds with the government's view. The government suggests (at 15) that *Tighe* permits a prior nonjury juvenile adjudication to be used for sentence enhancement if its existence is proven to a jury. Its only support for this position is found in a footnote in *Tighe* observing that various procedures could be used "to mitigate any prejudice to the defendant." 266 F.3d at 1194 n.5. However, after finding that the district court erred in counting the defendant's juvenile adjudication as a predicate offense under the ACCA, the court did not remand for a new trial to a jury to prove the fact of the prior adjudication. Instead, the court concluded that "Tighe could not be subjected to an enhanced sentence under ACCA" and remanded for resentencing without the enhancement at a lower offense level. *Id.* at 1195. Moreover, the Ninth Circuit later characterized *Tighe* as holding that "we do not recognize nonjury juvenile adjudications as 'convictions' falling within the *Apprendi* exception, and ordinarily we do not allow sentencing enhancements based on such adjudications." *Boyd v. Newland*, 467 F.3d 1139, 1151-52 (9th Cir. 2006).

In his dissent below, Judge Posner likewise interpreted *Apprendi* to preclude the use of prior nonjury juvenile adjudications to increase a defendant's sentence beyond the statutory maximum. Contrary to the government's argument (at 10) that "the reliability of juvenile adjudications based on the lack of a jury trial right [is] beside the point," Judge Posner viewed the reliability of juvenile adjudications as dispositive of the question whether such adjudications could be used for sentence enhancement purposes consistent with the Sixth Amendment. As he observed, "if it is true that juvenile defendants fare worse before judges than they would before juries—if there is reason to think that trial by jury would alter the outcomes in a nontrivial proportion of juvenile cases—one cannot fob off the *Apprendi* argument with the observation that a jury makes no difference." Pet. App. 47a-48a. In concluding that "a juvenile court 'conviction' is not usable for enhancing a federal sentence," Pet. App. 48a, Judge Posner agreed with what the government characterizes as petitioner's "broader claim."

Among the courts holding that *Apprendi*'s "prior conviction" exception does not apply to nonjury juvenile adjudications, only the Oregon Supreme Court has stated explicitly that a defendant's Sixth Amendment rights would be protected as long as the existence of the prior adjudication is later proved to a jury. The court held that prior juvenile adjudications could be used as sentencing factors, but that "the Sixth Amendment requires that when such an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must either be proved to a trier of fact or be admitted by a defendant." *State v. Harris*, 118 P.3d 236, 246 (Or. 2005).

Petitioner submits that the Sixth Amendment requires that a defendant have the right to contest before a jury the facts underlying any adjudication that would serve as a basis for sentence enhancement, and not merely the fact that the prior adjudication occurred. *Cf. Blakely v. Washington*, 542 U.S. 296, 306-07 (2004) ("The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish."). *Apprendi* carves out an exception for the fact of a "prior conviction" as a basis for sentence enhancement because of the presumed reliability of the conviction itself, not because of the accuracy of its record-keeping. See *Apprendi*, 530 U.S. at 488 ("the certainty that procedural safeguards attached to any 'fact' of prior conviction . . . mitigate[s] the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range").

However, even if the government were correct that *Apprendi* at most provides a right to challenge before a jury the existence of a prior nonjury juvenile adjudication, rather than the facts underlying that adjudication, such an interpretation would still entitle petitioner to be resentenced. Petitioner here was not permitted to contest the fact of his juvenile adjudication to a jury. A new sentencing proceeding would ensure that the jury right enshrined in the Sixth Amendment and given renewed effect in *Apprendi* continues to provide meaningful protection against oppressive sentences. See *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960) (Friendly,

J.) ("the jury has the power to bring in a verdict in the teeth of both law and facts . . . to prevent the punishment from getting too far out of line with the crime").

Ultimately, the government cannot deny that the lower courts have adopted a range of inconsistent approaches to *Apprendi*'s "prior conviction" exception. A majority hold that nonjury juvenile adjudications fall within the exception. Among those courts holding that the exception does not apply, there is confusion over the implications of that conclusion—i.e., whether it means that such adjudications cannot be used at all or can be used only if their existence is proven to a jury. There is no prospect that the conflict will resolve itself absent this Court's intervention. Only this Court can clarify the proper scope of *Apprendi*'s "prior conviction" exception.

II. This Case Provides A Suitable Vehicle For Resolution Of The Conflict

The government invokes the familiar refrain that petitioner's Sixth Amendment claim should not be addressed through certiorari because this case supposedly "is a poor vehicle" for review. To the contrary, petitioner's case vividly demonstrates the impact of using prior juvenile adjudications for sentence enhancement. Welch's criminal history ordinarily would have resulted in a sentencing range of 77 to 96 months, but the trial court's use of his nonjury juvenile adjudication as an ACCA predicate automatically raised his minimum sentence to 15 years. Pet. 5. The constitutionality of this substantial increase can only be determined by this Court's resolution of the question presented. In any event, the government's vehicle arguments are groundless.

First, the government maintains that review is inappropriate because the *Apprendi* issue was decided below on a petition for collateral relief under an ineffective assistance of counsel claim. But the posture is immaterial in this case because the Seventh Circuit decided the *Apprendi* issue squarely on the merits. Pet. App. 33a ("Strictly speaking, [the *Strickland*] standard does not require that we actually decide the merits of the underlying issue. However, in the context of this specific issue, considerations of judicial economy counsel that we address the underlying issue and decide it."). The Seventh Circuit's holding regarding *Apprendi*'s "prior conviction" exception is now the law of the circuit. As such, this petition is an appropriate vehicle for resolving the question presented. See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is . . . in a state of evolving definition and uncertainty, and one of importance to the administration of federal law.") (internal quotation marks and citations omitted).

The government also argues that Welch's guilty plea at the time of his juvenile adjudication undermines his Sixth Amendment claim. But there is a vast difference between pleading guilty in a proceeding that guarantees a defendant a jury trial right and pleading guilty where there is no such right. As this Court has observed, "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. . . . Even when defendants [waive jury] trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfair-

ness less likely." *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968). In the absence of a right to a jury trial, petitioner obviously could not have made a knowing and voluntary waiver of that right. Further, admissions by juveniles lack the reliability that the government claims would mitigate these Sixth Amendment concerns. Juveniles plead guilty in the overwhelming majority of cases, and they have a higher rate of false guilty pleas because of their aversion to the risks of trial, their tendency to focus on short-term rather than long-term consequences, their compliance with adult authority figures, and their immaturity in judgment. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground For Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 292-93 (2007); Amicus Brief of Center on Wrongful Convictions of Youth, et al. 17-19.

The government next suggests that this case is a poor vehicle because Welch has not challenged the "fact" of his juvenile adjudication. In fact, Welch has consistently objected to the use of his juvenile adjudication as an ACCA predicate. Pet. 5-6. That is all that is necessary for this Court to consider his *Apprendi* claim.

Finally, the government states (at 3) that according to his Presentence Investigation Report, Welch "had four prior convictions that were 'violent felonies' for purposes of the ACCA." As the government notes, the district court did not rely on Welch's aggravated battery conviction for spitting in classifying him as an ACC. If this Court holds that either of Welch's convictions at issue in this appeal does not qualify as a predicate offense under the ACCA, then his spitting conviction would not substitute as a third qualifying offense if the government subse-

quently chooses to revisit the issue. Several cases decided since Welch's sentencing confirm that spitting would not fall within the ACCA's definition of a "violent felony." See, *e.g.*, *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010) ("We think it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force —that is, force capable of causing physical pain or injury to another person. Even by itself, the word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force.") (citation omitted); *United States v. Martinez-Sanchez*, 278 F. App'x 676, 678 (7th Cir. 2008) (aggravated battery under Illinois statute in some cases may be nonviolent; citing example of spitting on police officer as an aggravated battery "where the defendant did not engage in force that is 'violent in nature'"). In other words, a determination that either of Welch's challenged convictions does not count for ACCA purposes would preclude a finding that Welch is subject to the ACCA's mandatory minimum sentence.

In short, because the government's vehicle arguments lack merit, and because this Court's intervention is necessary to resolve a deepening conflict on an important and recurring question, review of this case is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold the petition for disposition pending its decision in *Sykes*.

Respectfully submitted.

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DEVIN WELCH,

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UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari

BRIEF OF CENTER ON WRONGFUL CONVICTIONS OF YOUTH, JUVENILE LAW CENTER, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The organizations and individuals submitting this brief work with and on behalf of children and adolescents who come into contact with the juvenile justice system. *Amici* are juvenile law practitioners and researchers who, through decades of work representing, studying, and advocating on behalf of youth, have developed special expertise on the functioning of the juvenile courts. Based on this experience and settled empirical research, *Amici* share a deep concern that juvenile courts, as currently structured, may well be particularly prone to unreliable fact-finding. *Amici* know from their combined experience that juveniles' immaturity, vulnerability to external pressure and diminished ability to control impulses make them less culpable than adults and that the juvenile justice system was developed to take account of these distinct characteristics of youth. For these reasons, *amici* assert that prior juvenile adjudications should not be used to enhance adult criminal sentences above the statutory maximum.[1]

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[1] *Amici* file this brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

IDENTITY OF *AMICI*

A list and brief description of all *Amici* appears at Appendix A.

SUMMARY OF ARGUMENT

Amici Curiae ask this Court to grant certiorari to clarify that juvenile adjudications should not be used to enhance subsequent adult criminal sentences under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

This rule is proper for two reasons. First, as Judge Posner recognized in his dissenting opinion below, adjudications obtained in the juvenile court system as currently fashioned "may well lack the reliability of real convictions in criminal courts." *Welch v. United States*, 604 F.3d 408, 432 (7th Cir. 2010) (Posner, J., dissenting). This systemic risk of unreliability is a result of several factors, including the absence of jury trials; a juvenile court culture that discourages and sometimes precludes zealous and adversarial advocacy; and a heightened possibility that some of the evidence introduced in juvenile court, such as juvenile confessions, may be unreliable. Against such a backdrop, it would be fundamentally unfair to allow the use of juvenile adjudications to enhance adult sentences.

Second, the rule is consistent with this Court's longstanding recognition of the differences between adults and juveniles. Through more than six decades of jurisprudence, this Court has recognized that youth are different from adults; they are less mature, more vulnerable to external pressure, and more capable of redemption and growth. The juvenile justice system has historically functioned with these differ-

ences in mind. Quoting Judge Posner below, "[t]he constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement." *Id.* at 431. The use of juvenile adjudications to enhance adult sentences years later runs fundamentally contrary to the notion of a separate, protective juvenile court system.

ARGUMENT

I. The Absence of the Right To Trial By Jury in Juvenile Court, as Well as the Court's Continuing Informality, Present a Substantial Risk that Juvenile Adjudications Lack the Reliability of Criminal Convictions.

In 1967, this Court established that a defendant's right to have his innocence or guilt determined by a jury is "a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1967). Four years later, however, it declined to extend that right to children tried in juvenile court.[2] *McKeiver v.*

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[2] While Justice Blackmun's opinion in *McKeiver* has generally been cited as the opinion of the Court, the plurality opinions actually share no common rationale. A plurality opinion is the narrowest ground upon which an agreement among five justices can be inferred. *Marks v. United States*, 430 U.S. 188, 193 (1977) (expanding on and quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken

Pennsylvania, 403 U.S. 528 (1971). The *McKeiver* Court did so under the belief that "the imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function." *Id.* at 547 (plurality opinion).

In 2000, this Court broadly reaffirmed the importance of the jury trial right in *Apprendi v. New Jersey*, holding that every fact used to enhance a criminal sentence beyond the statutory maximum, except prior criminal convictions, must be found by a jury. 530 U.S. 466 (2000). Rejecting the argument that other factors, found with more limited constitutional protections, could be used to enhance the defendant's criminal sentence, this Court wrote:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached.

Id. at 484. This decision has since been heralded as enshrining the jury trial right as part of the "fundamental triumvirate of procedural protections intended to guarantee the *reliability* of criminal convictions." *United States v. Tighe*, 255 F.3d 1187, 1193

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by those Members who concurred in the judgments on the narrowest grounds.'")

(9th Cir. 2001) (emphasis added); *see also, Cunningham v. California*, 549 U.S. 270 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002).

The instant case highlights an intolerable tension between *McKeiver* and *Apprendi* that arises whenever a court uses a prior juvenile adjudication – obtained through a proceeding in which the defendant had no right to a jury trial – to enhance a subsequent criminal sentence. State and federal appellate courts across the country have split as to whether juvenile adjudications may be so used in light of *Apprendi*. Compare, *e.g.*, *Tighe*, 255 F.3d 1187 and *State v. Brown*, 879 So.2d 1276 (La. 2004) (both holding that nonjury juvenile adjudications cannot be used to increase a defendant's sentence beyond the statutory maximum) with *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002) and *State v. Weber*, 149 P.3d 646 (Cal. 2009) (both holding that a nonjury juvenile adjudication can be so used). The issue has been well-analyzed by legal scholars. *See, e.g.*, Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111 (2003); Joseph I. Goldstein-Breyer, *Calling Strikes Before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used to Enhance Subsequent Adult Sentences*, 15 Berkeley J. Crim. L. 65 (2010); Ellen Marrus, *"That Isn't Fair, Judge": The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 Hous. L.

Rev. 1323 (2004). It is ripe for resolution before this Court.

Central to the resolution of this tension are the concerns articulated by Judge Posner in his dissenting opinion below: key aspects of juvenile court practice as well as a growing body of scholarship indicate that juvenile court adjudications may well "lack the reliability of real convictions in criminal courts," in part due to the absence of the jury trial right. *Welch*, 604 F.3d at 432 (Posner, J., dissenting). *Amici* respectfully submit that these substantial concerns support a grant of certiorari by this Court in the instant case.

A) Juvenile Adjudications Must Rest on a Firm Foundation of Reliable Fact-Finding

The juvenile justice system has historically distinguished itself from the adult criminal justice system by emphasizing rehabilitation and limiting the adverse consequences that typically flow from criminal convictions. In keeping with these objectives, this Court has calibrated the child's right to procedural due process with the juvenile court's uniquely "intimate, informal, protective" atmosphere. *McKeiver*, 403 U.S. at 545; *In re Gault*, 387 U.S. 1, 16 (1967). For this reason, the fundamental right to a jury trial which undergirds our criminal justice system has been deemed inapplicable in juvenile proceedings. *McKeiver*, 403 U.S. at 545.

Even as juvenile courts undertake their rehabilitative mission, however, juvenile adjudications must rest on a firm foundation of reliable fact-

finding. Basic notions of due process demand no less; after all, the "same considerations that demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child." *In re Winship*, 397 U.S. 358, 365 (1970); *see also McKeiver*, 403 U.S. at 543 (recognizing that the fundamental fairness standard governing juvenile court is primarily concerned with accurate fact-finding procedures).

In recent decades, the need to ensure reliable fact-finding in juvenile court has become even more pronounced. Nationwide, state legislatures have tilted juvenile courts away from an emphasis on rehabilitation to a greater focus on accountability and punishment. *See, e.g.*, Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in* Youth on Trial 9, 13-14 (Thomas Grisso & Robert G. Schwartz eds., 2000). Many juvenile adjudications now carry lasting collateral consequences, such as lifetime registration for juveniles who have been adjudicated delinquent of certain sex offenses. *See, e.g.*, 730 ILCS 150/2(A)(5) and 3(a) (LexisNexis 2010); *In re J.W.*, 787 N.E.2d 747 (2003), restrictions from serving in the military, *see* Army Regulations 601-210, ¶¶ 4-4, 4-32(5) (2007), possible eviction from public housing, *see Dept. of HUD v. Rucker*, 535 U.S. 125, 133-136 (2002) (upholding the practice of evicting tenants from public housing due to their illegal conduct), and potential immigration consequences, *Wallace v. Gonzalez*, 463 F.3d 135 (2d Cir. 2006) (upholding the Board of Immigration Appeals' consideration of prior juvenile adjudication in deciding whether to grant an alien's application for adjustment of status); *see also* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of*

Counsel in Juvenile Delinquency Representation, 14 Lewis & Clark L. Rev. 771, 797 (2010). And as the current case illustrates, many state and federal courts lengthen adult sentences based on the existence of prior juvenile adjudications. With increased opportunities for adult-like consequences now flowing from juvenile delinquency adjudications, it is constitutionally imperative that the juvenile court system be able to determine reliably whether a child is innocent or guilty.

B) Research and Practice Suggest That Juvenile Court Findings Made In the Absence of a Jury May Be Less Reliable than Adult Criminal Convictions to Which the Jury Trial Right Attaches.

Since *McKeiver*, most states have continued to deny juveniles the right to a jury trial in juvenile court.[3] Consequently, most juvenile courts rely on

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[3] Juveniles currently have the right to request a jury trial in fourteen states: Alaska, Colorado, Kansas, Massachusetts, Michigan, Minnesota, Montana, New Mexico, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wyoming. *See R.L.R. v. State*, 487 P 2d 27 (Alaska 1971); Col. Rev. Stat. § 19-2-107 (2010); *In re L.M.*, 186 P.3d 164, 110, 172 (Kan. 2008); Mass. Gen. Laws ch. 119, § 55A (2007); Mich. Comp. Laws § 712A.17 (2007); Minn. R. Juv. Del. P. 20.02 (2010); Mont. Code Ann. § 41-5-1502 (2007); N.M. Stat. § 32A-2-16 (2007); Okla. Stat. tit. 10, § 7303-4.1 (2007); S.D. Codified Laws § 26-7A-34 (2007); *Arwood v. State*, 463 S.W.2d 943 (Tenn. Ct. App. 1970); Tex. Fam. Code Ann. § 54.03 (2007); W.Va. Code § 49-5-6 (2007); Wyo. Stat. Ann. § 14-6-223 (2007).

judge-made factual findings for delinquency adjudications. The unique nature of juvenile court proceedings, however, can render these judge-made findings unreliable. *See* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 Wake Forest L. Rev. 553, 564 (1998) (finding that juvenile court judges "often convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt"). Several factors contribute to this systemic risk of unreliable judicial fact-finding.

First, juvenile court judges are exposed to highly prejudicial, inadmissible evidence to a significantly greater extent than criminal court judges. Like criminal judges, of course, they are exposed to withdrawn guilty pleas, as well as confessions that are the subjects of pre-trial suppression hearings. This information alone is so prejudicial that it cannot always be ignored during the merits stage, even by the most conscientious of judges. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 313 (1991) (Kennedy, J., concurring in the judgment) (describing "the indelible impact a full confession may have on the trier of fact"); *United States v. Walker*, 473 F.2d 136, 138 (D. C. Cir. 1972) (stating that although a "judge is presumed to have a trained and disciplined judicial intellect...even the most austere intellect has a subconscious").

Unlike criminal court judges, however, juvenile court judges are also often exposed to additional inadmissible background information that may further skew their perception of a defendant's guilt or

innocence. In many jurisdictions, for instance, a juvenile judge may be exposed at a pre-trial detention hearing to a youth's "social history" file, documenting the youth's prior record of police contacts and delinquency adjudications. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 Minn. L. Rev. 141, 240 (1984). When the same judge later presides over that juvenile's trial, his perception of the juvenile's guilt or innocence may be influenced by his detailed knowledge of the juvenile's history. Similarly, juvenile court judges often gain access to information about a juvenile's family background, whether through the social history file or through the judge's own previous experience presiding over the adjudications of family members. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 305-06 (2007). A child who comes from a family of known "troublemakers" may fare worse before a judge who is familiar with that fact. Indeed, some scholars have noted that in such scenarios, juvenile judges may be more likely to adjudicate children delinquent simply in order to channel them towards court-ordered treatment, under the belief that treatment would help them escape their family's influence. *See* Guggenheim & Hertz, *supra*, at 570.

Further, because much youth crime involves group activity, juvenile court judges frequently preside over joint trials of multiple co-defendants, including some who have confessed and implicated other co-defendants, *see id.* at 571, or over the trials of youth whose co-defendants have already entered guilty pleas before that same judge. Drizin & Luloff,

supra, at 305. Even if some judges are able to set such facts aside, not every judge can or does. *See* Harry Kalven Jr. & Hans Zeisel, *The American Jury* 107 (2d ed. 1971) (identifying the existence of facts that only the judge knew as a statistically significant reason for disagreement between judges and juries).

Moreover, the jury trial right is premised in part on the view that the collective decision-making that characterizes jury fact-finding produces more reliable determinations than judicial fact-finding alone. The jury model's central virtue is its ability to bring people "from different walks of life...into the jury box," thereby ensuring that a "variety of different experiences, feelings, intuitions and habits" inform the jury's decision-making. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955). Social scientists have discovered that this richness of perspective is what makes juries such excellent triers of fact; by exchanging ideas and learning from each other's experiences, jurors can construct a multi-faceted, deep understanding of the case being tried. *See* Guggenheim & Hertz, *supra*, at 576. This collective perspective is simply not present in judicial fact-finding.

Indeed, empirical studies have found that judges and juries do not reach equivalent results; judges are more likely to convict than juries. *See* Kalven & Zeisel, *supra*. This may be particularly relevant in juvenile court, where jurors might share the widespread view that young defendants are less blameworthy and more capable of redemption than their adult counterparts. *See* Feld, *Criminalizing*, *supra* at 246; *Duncan*, 391 U.S. at 147 ("When juries differ with the result at which the judge would have

arrived, it is usually because they are serving some of the very purposes for which they were created.").

Moreover, even if judges were as effective at fact-finding as juries, the right to a jury trial would still be vital, and constitutionally required. In *Duncan v. Louisiana*, this Court held that the Fourteenth Amendment extends the right to a trial by jury to defendants facing prosecutions under state law when they face punishment for a "serious" offense. 391 U.S. 145, 154 (1968). The *Duncan* Court declared that fundamental fairness entitles the defendant to a jury trial to ensure a buffer against arbitrary government action, explaining that:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . Fear of unchecked power . . . [finds] expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id at 155-56. To impose serious adult consequences on a defendant without granting the right to a jury trial makes the defendant vulnerable to criminal punishment without the fundamental protections central to our system of justice.[4]

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[4] Notably, those states with laws exposing juveniles to potential adult consequences through blended sentencing or youthful of-

C) Juvenile Court Practice May Further Undermine the Reliability of Juvenile Adjudications.

The problems associated with judge-made factual findings are compounded in juvenile court by a number of other unique hurdles that can hinder the task of reliable fact-finding. While juveniles have a long-established constitutional right to counsel in juvenile proceedings, *In re Gault*, 387 U.S. 1 (1967), the adequacy of such representation has been a persistent concern for scholars and practitioners alike. *See* Fedders, *supra*, at 791-95; Drizin & Luloff, *supra*, at 283; ABA Juvenile Justice Ctr., Juvenile Law Ctr., and Youth Law Ctr., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 5-12 (1995); Nat'l Juvenile Defender Ctr., *Illinois: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings* 48-60 (Oct. 2007); *see also* Nat'l Juvenile Defender Ctr., *Assessments*.

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fender statutes grant juveniles the right to a jury trial. *See* Ark. Code Ann § 9-27-325 (2007); Colo. Rev. Stat. § 19-2-107 (2007); Conn. Gen. Stat. §§ 46b-133c and 46b-133d (2007); Idaho Code Ann. § 20-509 (2007); 705 Ill. Comp. Stat. 405/5-810 (2007) ;Kan. Stat. Ann §§ 38-2347 and 38-2357 (2007); Minn. Stat. § 260B.130 (2007); N.H. Rev. Stat. Ann. § 169-B:19 (2007); Ohio Rev. Code Ann. § 2151.35 (LexisNexis2007); R.I. Gen. Laws § 14-1-7.3 (2007); Va. Code Ann. § 16.1-241 (2007). Illinois has taken this one step further, giving juveniles the right to jury trials in proceedings that could result in determinate sentences of confinement in juvenile correctional institutions until their twenty-first birthdays. *See* 705 Ill. Comp. Stat. 405/5-815 and 5-820

http://www.njdc.info/assessments.php (last visited Oct. 1, 2010) (presenting assessments of nineteen states that report the need for reform on issues related to timing of appointment of counsel, frequency of waiver, attorney compensation, supervision and training, and access to investigators); Judith B. Jones, U. S. Dep't of Justice Office of Juvenile Justice & Delinquency Prevention, *Juvenile Justice Bulletin* 2 (Jun. 2004) (acknowledging that competent juvenile defense counsel will help defendants avoid self-incrimination, protect their constitutional rights, and mount an adequate defense). The importance of the assistance of counsel for youth in juvenile court has become even more pronounced, as research has revealed that "juveniles as a class are ill-equipped to understand, manage, or navigate the complexities of the modern juvenile (or adult) justice system." Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 Rutgers L. Rev. 175, 182 (2007).

Despite the vital role attorneys play in juvenile court, many children still appear without counsel. Even forty years after *Gault* and the subsequent development of comprehensive standards by the Institute of Judicial Administration and American Bar Association that, among other things, urge the prohibition of juvenile waiver of counsel, many states still allow juvenile defendants to waive these rights.[5]

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[5] The absence of counsel from juvenile proceedings is of particular concern given the high rates of juvenile guilty pleas. *See* Fedders, *supra*, 795; Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court - A Promise Unfulfilled*, 44

Inst. Jud. Admin. A.B.A., *Juvenile Justice Standards Annotated: A Balanced Approach* 255 (Robert E. Shepherd, Jr. ed., 1996). These waivers are frequently accepted even when the child does not adequately understand what "waiver" means or how an attorney might assist him or her.[6] Drizin & Luloff, *supra*, at 285.

Even when juveniles are represented, lack of resources and time constraints often leave children's lawyers overburdened and ill-prepared to provide adequate representation. *See* Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 Geo. J. on Poverty L. & Pol'y 543, 559-60.[7] In juvenile courts across the country,

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No. 3 Crim. L. Bull. 371, 394 (2008) (summarizing studies of four states estimating that approximately ninety percent or more of delinquency cases were resolved by plea). A shocking example of the tragic consequences that can occur in the absence of counsel is evident in the Pennsylvania Supreme Court's finding of former Luzerne County juvenile judge Ciavarella's "systematic failure to explain to the juveniles [before him] the consequences of foregoing trial, and the failure to ensure that the juveniles were informed of the factual bases for what amounted to peremptory guilty pleas" in his courtroom. *See In Re: Expungement of Juvenile Records and Vacatur of Luzerne County Juvenile Court Consent Decrees or Adjudications from 2003-2008*, No. 81 MM 2008, 2009 Pa. LEXIS 2286 at *6 (Pa. Oct. 29, 2009).

[6] In a recent study of ninety-nine appeals challenging a juvenile's waiver of right to counsel, roughly eighty resulted in the adjudication being overturned. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 Fla. L. Rev. 577, 609 (2002).

[7] An increase in the publication of, and national attention to, aspirational guidelines for access to counsel in juvenile court serves as acknowledgement of a broken system. *See* Nat'l Juve-

attorneys often fail to do any factual investigation, including interviewing witnesses, visiting crime scenes, or hiring investigators. *See* Majd & Puritz, *supra*, at 558 (describing how defenders "often must represent clients without the most basic tools" like computers, internet access and necessary investigators, social workers or paralegals). Similarly, some lawyers practicing in juvenile court fail to file pretrial motions, prepare for dispositional hearings and bench trials, or even meet with their clients outside of court appearances. *See* Fedders, *supra*, at 792-93. Attorneys rely heavily on the defendant and his or her parents to identify and produce any necessary witnesses. Rarely will counsel have the resources to hire an investigator to examine the merits of the case. *See* Drizin & Luloff, *supra*, at 289-90.

Additionally, since its inception, the juvenile justice system has fostered an informal, non-adversarial culture that downplays and even discourages zealous advocacy. *See McKeiver*, 403 U.S. at 545 (noting that juvenile court proceedings lack the "fully adversary" character of adult criminal trials). This culture has its roots in the *parens patriae* underpinnings of the juvenile court, in which the court

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nile Defender Ctr. & Nat'l Legal Aid & Defender Assoc., *The Ten Core Principles for Providing Quality Delinquency Representation* (Jul. 2008), *available at* http://www.njdc.info/pdf/10_Core_Principles_2008.pdf (recognizing that legal representation of children is a specialized area of law and the right to counsel can be fully implemented only if there is resource parity and ongoing training); Nat'l Council of Juvenile & Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 105 (2005), *available at* http://www.ncjfcj.org (calling for greater role of counsel in juvenile court).

was conceived as a benevolent actor seeking to promote children's "best interests" and welfare. *See* Feld, *Criminalizing*, *supra*, at 187. Unfortunately, many juvenile courts continue to "view zealous advocacy as antithetical to rehabilitation." Majd & Puritz, *supra*, at 555. Some attorneys, believing that their client will be best served by submitting to the consequences of a juvenile adjudication, may fail to research and investigate cases even when the client requests it. *See* Fedders, *supra*, at 794-95.

By discouraging juvenile defense attorneys from zealously subjecting the State's claims to the full-blown "crucible of meaningful adversarial testing," *United States v. Cronic*, 466 U.S. 648, 656 (1984), this culture makes reliability a secondary concern. In effect, accurate fact-finding and the child's constitutional rights are subordinated to the attorney's or court's perception of the child's best interests and need for treatment. *See* Majd & Puritz, *supra*, at 555-56 (describing reports that juvenile courts and judges place a "premium" on "maintaining a friendly atmosphere" that discourages some attorneys from filing motions or pursuing defenses).

Another significant barrier to reliable fact-finding in juvenile court concerns the nature of the evidence regularly introduced against children. This Court has recognized that juveniles are categorically less mature, less able to weigh risks and long-term consequences, more vulnerable to external pressures, and more compliant with authority figures than are adults. *Roper v. Simmons*, 543 U.S. 551, 569 (2005);

Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).[8] These youthful traits make juveniles particularly susceptible to the pressures of even a standard police interrogation by falsely confessing. *See Corley v. United States*, 129 S. Ct. 1558, 1570 (2009) (stating that "there is mounting empirical evidence that these pressures [associated with custodial interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed") (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N. C. L. Rev. 891, 906-07 (2004)); Saul Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3 (2010) *available at* http://www.springerlink.com/content/85vh322j08578410/fulltext.pdf (noting that juveniles' developmental differences put them at special risk for false confessions in the interrogation room); *In re. Gault*, 387 U.S. at 52 (stating that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children"). In fact, a recent empirical study of proven wrongful convictions of youth has found that juveniles are twice as likely as their adult counterparts to confess to crimes they did not commit. *See* Joshua A. Tepfer,

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[8] Defenders who represent youth must possess specialized skills and a sophisticated understanding of the line of cases from this Court that recognize the ever-expanding body of research about normative adolescent development. Frequently, however, juvenile court is dismissed by attorneys as "kiddie court"– merely a training ground for adult criminal court. This revolving door through juvenile court leaves young people with the most inexperienced attorneys and inhibits defenders' development of expertise in juvenile matters. *See* Majd & Puritz, *supra*, at 556-58.

Laura H. Nirider, & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. (2010) (forthcoming 2010). Unfortunately, these false confessions often result in wrongful adjudications and convictions, since confession evidence is considered "the most compelling possible evidence of guilt." *Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (citing *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

Concerns about the use of unreliable evidence against juveniles extend past the problem of false confessions. Not only are juveniles more likely than adults to giving false confessions during police questioning, but they are also more likely to implicate others falsely – frequently other children. Tepfer, Nirider & Tricarico, *supra*. Similarly, juveniles may be more prone to making unreliable eyewitness identifications, since they are easily influenced by the behavior of law enforcement officers during lineups which may subtly steer the child toward a particular individual. Drizin & Luloff, *supra*, at 276; Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 The Future of Child. 15 (2008). Collectively, these findings may blunt the reliability of substantial amounts of the evidence routinely relied upon in juvenile court.

These obstacles to reliable fact-finding in juvenile court are neither universal nor irremediable – indeed, as Judge Posner pointed out in his dissenting opinion, it would be "hasty" to reach such conclusions. *Welch v. United States*, 604 F.3d at 432 (Posner, J., dissenting). However, these concerns are sufficiently weighty to justify the exclusion of juvenile adjudications from the adult sentencing calculus.

Amici submit that the use of such potentially flawed juvenile adjudications to enhance adult criminal sentences beyond the statutory maximum is contrary to *Apprendi*.

II. Using Juvenile Adjudications to Enhance Adult Criminal Sentences Ignores Both the Settled Differences Between Juveniles and Adults and the Justifications for a Separate Juvenile Justice System

As Justice Felix Frankfurter wrote more than fifty years ago, "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning i[f] uncritically transferred to determination of a state's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Subsequently, for more than sixty years, this Court has strictly adhered to the notion that the law should categorically treat juveniles differently than adults. *See Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United Statesf*, 383 U.S. 541, (1966); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948) .

Most recently in *Roper v. Simmons* and *Graham v. Florida*, this Court recognized that juvenile offenders, whose personal and developmental attributes sharply distinguish them from adults, should be spared the harshest adult sentences under the Eighth Amendment to the Constitution. In prohibiting the execution of juvenile offenders, the *Roper*

Court recognized that the differences between children and adults have been confirmed by decades of psychological and cognitive development research. Relying on that research, the Court concluded that, as compared to adults, juveniles have a "lack of maturity and an undeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their character is not yet "as well formed as that of an adult." *Roper*, 543 U.S. at 569-70. For those reasons, it determined that juveniles are categorically less culpable and more capable of rehabilitation and redemption than adults. *Id.* at 570-71. Last term, in *Graham*, this Court reaffirmed the rationale underlying *Roper*, declaring that "[n]o recent data provide reason to reconsider the court's observations in *Roper* about the nature of juveniles. "Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham*, 130 S. Ct. at 2026.

In an analogous situation, the Supreme Court of South Dakota recently adopted the reasoning of *Graham* in declining to consider a criminal defendant's prior juvenile adjudication at sentencing. Relying on this Court's holdings in *Roper* and *Graham* that juveniles are less mature – and therefore less culpable – than adults, and that "from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed[,]" *Graham*, 130 S. Ct. at 2026-27 (quoting *Roper*, 543 U.S. at 570), the court explained:

> Indeed, changes in a defendant's circumstances, such as age, "may render the earlier uncharged act too remote and legally irrelevant." Edward J. Imwinkelried, 2 Uncharged Misconduct Evidence § 8:8 (Rev. ed. 1998). Thus, a "time lapse could be fatal to admissibility of the evidence if the defendant was a callow teenager at the time of the earlier crime." *Id.* "Because of the considerable changes in character that most individuals experience between childhood and adulthood, behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult." *State v. Barreau*, 651 N.W.2d 12, 23 (Wis. Ct. App. 2002) (citations omitted) (error to admit prior offense committed when defendant was a minor).

State v. Fisher, 783 N.W.2d 664, 674 (S.D. 2010). As the court recognized, to permit "remote and legally irrelevant" prior juvenile adjudications to influence adult sentencing fails to adequately account for the key distinctions between juveniles and adults.

Permitting the use of juvenile adjudications to enhance subsequent criminal sentences is also at odds with *McKeiver*'s promise of a protective juvenile court. As the Louisiana Supreme Court held in *State v. Brown*, it is "contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use adjudications obtained for treatment purposes to punish them more severely as adults." 979 So. 2d 1276, 1288 (La. 2004).

Indeed, using juvenile adjudications to enhance adult sentences erodes the boundaries between juvenile and adult courts. Juvenile court has historically been shaped by its recognition of the differences in culpability between children and adults. Even as recent state legislative changes have narrowed the boundaries of juvenile court and pushed more juveniles into the adult system, every state has continued to maintain a separate juvenile justice system in recognition of the unique characteristics of youth. Using delinquency adjudications years later to enhance an adult's sentence "put[s] an effective end to what ha[d] been the idealistic prospect of an intimate, informal protective proceeding." *McKeiver*, 403 U.S. at 545.

The conflict inherent in erosion of the boundaries between juvenile and criminal courts is compounded by McKeiver's holding that jury trials are not constitutionally required in juvenile proceedings. *McKeiver* denied juveniles the right to a jury trial because juvenile proceedings were not criminal prosecutions and because judges based dispositions on the needs of the offender rather than the gravity of the offense. *See* Feld, *Constitutional*, *supra*, at 1193-94. To deprive juveniles of adult procedures but then impose adult consequences is fundamentally unfair. The Louisiana Supreme Court recognized this conflict, deeming it "contradictory and fundamentally unfair" to deny juveniles the full panoply of adult procedural safeguards in juvenile court but then to equate their juvenile adjudications with adult convictions for the purpose of adult sentencing. *State v. Brown*, 979 So. 2d at 1288; *see also* Feld, *Constitutional*, *supra*, at 1194 (prohibiting the use of juvenile

adjudications to enhance subsequent criminal convictions).

States cannot have it both ways. Juveniles must be spared adult-like sanctions or consequences in exchange for the lesser procedural safeguards, or full due process protections under the Constitution must be made available in juvenile court, including the right to jury trials.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court grant petitioner Devin Welch's petition for a writ of certiorari.

Respectfully submitted,

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Organizations

The **Barton Child Law & Policy Center** is a program of Emory Law School dedicated to ensuring safety, well-being and permanency for abused and court-involved children in Georgia. The mission of the center is to promote and protect the well-being of neglected, abused and court-involved children in the state of Georgia, to inspire excellence among the adults responsible for protecting, nurturing, and defending these children and youth, and to prepare child advocacy professionals.

The Barton Center was founded in March 2000. The Center has been involved in representation of juveniles in delinquency cases since the summer of 2001. The Barton Center currently houses the Barton Child Law and Policy Clinic (CLPC) and the Barton Juvenile Defender Clinic (JDC). CLPC focuses on policy and legislative reform and provides students with clinical experiences in developing and implementing evidence-based policies. JDC provides a clinical experience for third year law students in the juvenile court arena. The focus of the clinical experience is to provide quality representation to court involved children and youth by ensuring fairness and due process in their court proceedings and by ensuring they receive the holistic representation they need. Legal services provided by the JDC are provided at no cost to our clients.

The **Center for Children's Advocacy (CCA)** is a non-profit organization based at the University of Connecticut Law School and is dedicated to the promotion and protection of the legal rights of poor children. The children represented by CCA are dependent on a variety of Connecticut state systems, including judicial, health, child welfare, mental health, education and juvenile justice. CCA engages in systemic advocacy focusing on important legal issues that affect a large number of children, helping to improve conditions for abused and neglected children in the state's welfare system as well as in the juvenile justice system. CCA works to ensure that children's voices are heard and that children are afforded legal protections everywhere – community, foster placements, educational institutions, justice system and child welfare.

The **Center on Children and Families** (CCF) at Fredric G. Levin College of Law is based at University of Florida, the state's flagship university. CCF's mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil

Hawkins Civil Clinic and Gator TeamChild juvenile law clinic.

The **Central Juvenile Defender Center**, a training, technical assistance and resource development project, is housed at the Children's Law Center, Inc. In this context, it provides assistance on indigent juvenile defense issues in Ohio, Kentucky, Tennessee, Indiana, Arkansas, Missouri, and Kansas.

The **Center on Wrongful Convictions of Youth** (CWCY) is part of Northwestern University School of Law's Bluhm Legal Clinic and is a joint project of two of the Clinic's highly acclaimed Centers: the Children and Family Justice Center and the Center on Wrongful Convictions. The CWCY's unique mission is to uncover and remedy wrongful adjudications and convictions of children, as well as to promote public awareness and support for nationwide initiatives – such as efforts to reduce juvenile false confessions and increase reliability in the juvenile court system -- aimed at preventing future wrongful convictions. In so doing, the CWCY works with experienced juvenile attorneys and wrongful conviction experts across the nation on a daily basis. Most recently, CWCY attorneys secured the exoneration and release of Thaddeus Jimenez, a young man who was arrested at age thirteen and sentenced to forty-five years in prison for a murder that he did not commit. See Matthew Walberg, Teen, Wrongly Convicted, Out 16 Years Later as Man, Chicago Tribune, May 5, 2009. The founder of the CWCY, Steven Drizin, has also recently been cited by the United States Supreme Court as an authority on

false confessions and wrongful convictions. Corley v. U.S., 129 S. Ct. 1558, 1570 (2009) (stating that "there is mounting empirical evidence that these pressures [associated with custodial police interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed") (citing Steven Drizin and Richard Leo, The Problem of False Confessions in the Post-DNA World, 82 N. C. L. Rev. 891, 906-07 (2004)).

The Northwestern University School of Law's Bluhm Legal Clinic has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center** (CFJC) was established in 1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students in the legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **Children's Law Center, Inc.** in Covington, Kentucky has been a legal service center for children's rights since 1989, protecting the rights of youth through direct representation, research and policy development and training and education. The Center provides services in Kentucky and Ohio, and

has been a leading force on issues such as access to and quality of representation for children, conditions of confinement, special education and zero tolerance issues within schools, and child protection issues. It has produced several major publications on children's rights, and utilizes these to train attorneys, judges and other professionals working with children.

Founded in 1977, the **Children's Law Center of Massachusetts (CLCM)** is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in juvenile justice, child welfare and education matters. CLCM attorneys regularly participate as faculty in MCLE and other continuing legal education seminars and serve as *amicus curiae* in juvenile justice and child welfare matters in Massachusetts courts. The CLCM is particularly concerned with fair treatment and outcomes for juveniles in delinquency proceedings and in adult court.

The ***Civitas* ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children. The ChildLaw Center maintains a particular interest in the rules and procedures regulating the legal and

governmental institutions responsible for addressing the needs and interests of court-involved youth.

Juvenile Justice Project of Louisiana (JJPL) is the only statewide, non-profit advocacy organization focused on reform of the juvenile justice system in Louisiana. Founded in 1997 to challenge the way the state handles court involved youth, JJPL pays particular attention to the high rate of juvenile incarceration in Louisiana and the conditions under which children are incarcerated. Through direct advocacy, research and cooperation with state run agencies, JJPL works to both improve conditions of confinement and indentify sensible alternatives to incarceration. JJPL also works to ensure that children's rights are protected at all stages of juvenile court proceedings, from arrest through disposition, post-disposition and appeal, and that the juvenile and adult criminal justice systems take into account the unique developmental differences between youth and adults in enforcing these rights. JJPL continues to work to build the capacity of Louisiana's juvenile public defenders by providing support, consultation and training, as well as pushing for system-wide reform and increased resources for juvenile public defenders.

The **Juvenile Justice Initiative** (JJI) of Illinois is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, advocacy groups, legal educators, practitioners, community service providers and child advocates supported by private donations from foundations, individuals and legal firm. JJI as a coalition establishes or joins broad-based collaborations

developed around specific initiatives to act together to achieve concrete improvements and lasting changes for youth in the justice system, consistent with the JJI mission statement. Our initiatives seek to create a constituency for youth in the justice system with an emphasis on promoting intervention strategies, ensuring fairness for youth in the justice system, and building community resources for comprehensive continuums of services and sanctions to reduce reliance on confinement. Our collaborations work in concert with other organizations, advocacy groups, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for youth in the justice system.

The **Midwest Juvenile Defender Center** (MJDC) is an eight state regional network of defense attorneys representing juveniles in the justice system. It was created to increase the capacity of juvenile defenders in the Midwest. MJDC gives juvenile defense attorneys a more permanent capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile crime. MJDC provides support to juvenile defenders to ensure that youth are treated fairly in the justice system.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of

representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice.

The National Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. It also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The mission of the **National Juvenile Justice Network** (NJJN) is to enhance the capacity of state-based juvenile justice coalitions and organizations to advocate for state and federal laws, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises thirty-nine members in thirty-three states, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are fundamentally different from adults and should be treated in a developmentally appropriate manner focused on their rehabilitation. Youth should not be transferred into the punitive adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and are

exposed to serious, hardened criminals. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are rehabilitative, community-based programs that take a holistic approach, engage youth's family members and other key supports, and provide opportunities for positive youth development.

The **Office of the State Appellate Defender** is a state agency created by the Illinois legislature in 1972. Its main purpose is to represent indigent persons on appeal from criminal and delinquent minor proceedings when appointed to do so by a court. Many of the agency's clients are affected by the use of their prior juvenile court adjudications in aggravation at sentencing. The issue of the reliability of these adjudications is thus of particular importance to the agency and its clients.

The **Rutgers Urban Legal Clinic**, a clinical program of Rutgers Law School – Newark, was established over thirty years ago to assist low-income clients with legal problems that are caused or exacerbated by urban poverty. The Clinic's Criminal and Juvenile Justice section provides legal representation to individual clients and undertakes public policy research and community education projects in both the juvenile and criminal justice arenas. In recent years, ULC students and faculty have worked with the New Jersey Office of the Public Defender, the New Jersey Institute for Social Justice, the Essex County Juvenile Detention Center, Covenant House – New Jersey, staff of the New Jersey State Legislature, and a host of national organizations on a range of juvenile justice practice

and policy issues, including questions pertaining to the due process and fourth amendment rights of young people.

The Sentencing Project is a national non-profit organization engaged in research and education regarding criminal justice policy. The organization has produced a series of books, policy reports, and journal articles assessing the effects of sentencing policies and practices on public safety and individual defendants. Staff of The Sentencing Project are frequently called upon to testify before Congress and other legislative bodies regarding the effects of mandatory sentencing and related policies, and to recommend alternative policy options. The organization has also been engaged in analyzing the effects of trying juveniles in the adult court system, and the impact of adult sentences on deterrence and recidivism.

Individuals

Tamar Birckhead is an assistant professor of law at the University of North Carolina at Chapel Hill where she teaches the Juvenile Justice Clinic and the criminal lawyering process. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense. Professor Birckhead's 2008 article on raising the age of juvenile court jurisdiction in North Carolina has received significant attention at both the state and national

levels. Licensed to practice in North Carolina, New York and Massachusetts, Professor Birckhead has been a frequent lecturer at continuing legal education programs across the United States as well as a faculty member at the Trial Advocacy Workshop at Harvard Law School. She is vice president of the board for the North Carolina Center on Actual Innocence and has been appointed to the executive council of the Juvenile Justice and Children's Rights Section of the North Carolina Bar Association. Professor Birckhead received her B.A. degree in English literature with honors from Yale University and her J.D. with honors from Harvard Law School, where she served as Recent Developments Editor of the Harvard Women's Law Journal. She regularly consults on matters within the scope of her scholarly expertise, including issues related to juvenile justice policy and reform, criminal law and procedure, indigent criminal defense, and clinical legal education. She is frequently asked to assist litigants, advocates, and scholars with amicus briefs, policy papers, and expert testimony, as well as specific questions relating to juvenile court and delinquency.

Professor **Emily Buss** is the Mark and Barbara Fried Professor of Law and Kanter Director of Policy Initiatives at the University of Chicago Law School. Her research and scholarship is in the area of children's and parental rights. Recent articles include *Constitutional Fidelity Through Children's Rights*, 2004 Supreme Court Review 355, which demonstrates the need to account for child and adolescent development in applying constitutional rights to minors.

Martin Guggenheim is the Fiorello La Guardia Professor of Clinical Law at N.Y.U. Law School, where he has taught since 1973. He served as Director of Clinical and Advocacy Programs from 1988 to 2002 and also was the Executive Director of Washington Square Legal Services, Inc. from 1987 to 2000. He has been an active litigator in the area of children and the law and has argued leading cases on juvenile delinquency and termination of parental rights in the Supreme Court of the United States. He is also a well-known scholar whose books include "What's Wrong with Children's Rights" published by Harvard University Press in 2005 and "Trial Manual for Defense Attorneys in Juvenile Court," published by ALI-ABA in 2009 which was co-authored with Randy Hertz and Anthony G. Amsterdam. He has won numerous national awards including in 2006 the Livingston Hall Award given by the American Bar Association for his contributions to juvenile justice.

Kristin Henning is a Professor of Law at Georgetown University School of Law and Co-Director of the Georgetown Juvenile Justice Clinic. The Clinic was founded in 1973 to represent children accused of misdemeanor and felony offenses in the District of Columbia. Clinic faculty, fellows and students provide highly effective holistic representation to their clients by protecting the rights and interests of youth in the juvenile justice system, advocating on behalf of youth in related proceedings such as special education and school disciplinary hearings and lobbying for mental health services, drug treatment and other interventions that are appropriately matched with the child's age,

mental capacity and developmental stage. Clinic faculty and alumni engage in local, regional and national juvenile justice reform by training defenders throughout the country, developing local and national juvenile justice standards for lawyers and other stakeholders, writing and updating practice manuals, conducting research and publishing law review articles that analyze the need for reform and consulting with local and state officials to advance reform efforts.

Randy Hertz is a clinical professor at N.Y.U. Law School, the vice dean of the law school, the director of the school's clinical program, and the supervising attorney of the school's Juvenile Defender Clinic. Before joining the N.Y.U. faculty, he worked at the Public Defender Service for the District of Columbia, in the juvenile, criminal, appellate and special litigation divisions. He writes in the areas of juvenile and criminal justice and is the co-author, with Professors Anthony G. Amsterdam and Martin Guggenheim of N.Y.U. Law School, of "Trial Manual for Defense Attorneys in Juvenile Court" (now in its second edition) and, with Professor James Liebman of Columbia Law School, of "Federal Habeas Corpus Law and Practice" (the sixth edition of which will be issued in 2011). He is an editor-in-chief of the Clinical Law Review and the former Chair of the ABA's Section of Legal Education and Admissions to the Bar. He is the recipient of the American Bar Association's Livingston Hall award for advocacy in the juvenile justice field; the Association of American Law Schools' William Pincus Award for Outstanding Contributions to Clinical Legal Education; the law

school's award for Distinguished Teaching; and the University's award for Distinguished Teaching by a University Professor.

Barry Feld is Centennial Professor of Law, University of Minnesota Law School. He received his B.A. from the University of Pennsylvania; his J.D. from University of Minnesota Law School; and his Ph.D. in sociology from Harvard University. He has written eight books and about seventy law review and criminology articles and book chapters on juvenile justice with a special emphasis on serious young offenders, procedural justice in juvenile court, adolescents' competence to exercise and waive *Miranda* rights and counsel, youth sentencing policy, and race. One of his earliest books, *Neutralizing Inmate Violence: Juvenile Offenders in Institutions* (Ballinger 1976), studied ten different juvenile correctional programs and the impact of institutional security practices on social control. His most recent books include: *Bad Kids: Race and the Transformation of the Juvenile Court* (Oxford 1999), which received the Outstanding Book Award from the Academy of Criminal Justice Sciences and the Michael Hindelang Outstanding Book Award from the American Society of Criminology; *Cases and Materials on Juvenile Justice Administration* (West 2000; 2nd Ed. 2005); and *Juvenile Justice Administration in a NUTSHELL* (West 2002). Feld has testified before state legislatures and the U. S. Senate, spoken on various aspects of juvenile justice administration to legal, judicial, and academic audiences in the United States and internationally. He worked as a prosecutor in the Hennepin County (Minneapolis) Attorney's Office and served on the

Minnesota Juvenile Justice Task Force (1992 -1994), whose recommendations the 1994 legislature enacted in its revisions of the Minnesota juvenile code. Between 1994 and 1997, Feld served as Co-Reporter of the Minnesota Supreme Court's Juvenile Court Rules of Procedure Advisory Committee.

Edward D. Ohlbaum is a trial lawyer who joined the Temple Law School Faculty in Spring 1985. The first holder of Temple's first chair in trial advocacy, the Jack E. Feinberg Professorship of Litigation, he was awarded the prestigious Richard S. Jacobson Award, given annually by the Roscoe Pound Foundation to one professor for "demonstrated excellence in teaching trial advocacy" in 1997. He is a former senior trial lawyer with the Defender Association of Philadelphia. Professor Ohlbaum is the senior member of the coaching team of the law school's championship mock trial team—which has won 5 national championships in the past thirteen years—and the architect of Temple's unique L.L.M. in Trial Advocacy. His programs have won awards from the American College of Trial Lawyers and the Committee on Professionalism of the American Bar Association. The author of three books, Professor Ohlbaum is a frequent speaker on evidence and advocacy at key international and domestic conferences.

Professor **Jane M. Spinak** is the Edward Ross Aranow Clinical Professor of Law. A member of the Columbia faculty since 1982, she co-founded the Child Advocacy Clinic, which currently represents adolescents aging out of foster care. During the mid-1990s, Professor Spinak served as attorney-in-charge

of the Juvenile Rights Division of The Legal Aid Society of New York City. From 2001 to 2006, she was the director of clinical education at the law school. In 2002, she became the founding chair of the board of the Center for Family Representation, an advocacy and policy organization dedicated to ensuring the procedural and substantive rights of parents in child-welfare proceedings. Professor Spinak is a member of the New York State Permanent Judicial Commission on Justice for Children. She has served on numerous tasks forces and committees addressing the needs and rights of children and families and has trained and lectured widely on those issues to lawyers, social workers and other mental health professionals. She has authored books and articles for child advocates and judges on child welfare and Family Court matters including a Permanency Planning Judicial Benchbook. Her current research focuses on Family Court reform as discussed in Adding Value to Families: The Potential of Model Family Courts (2002 Wisconsin Law Review 332) and Romancing the Court (Family Court Review, April 2008). In 2005, Professor Spinak was named a Human Rights Hero for her work on behalf of children by the ABA's Human Rights Magazine. In 2008 she was awarded the Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare by the New York State Bar Association. Professor Spinak is currently co-chairing the Task Force on Family Court in New York City recently established by the New York County Lawyer's Association.